TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

1922

No. 61[redacted]207

FRED W. CRAMER, IRA B. CRAMER, AND CENTRAL PACIFIC RAILWAY COMPANY, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR NINTH CIRCUIT.

FILED NOVEMBER 15, 1921.

(28,574)

(28,574)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 619.

FRED W. CRAMER, IRA B. CRAMER, AND CENTRAL PACIFIC RAILWAY COMPANY, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR NINTH CIRCUIT.

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Names and Addresses of Attorneys of Record.

S. W. WILLIAMS, Esq., Special Assistant to the Attorney General,
Attorney for the Plaintiff, Postoffice Building, San Francisco, Calif.

FRANK THUNEN, Esq., Attorney for Defendants, 65 Market St., San Francisco, Calif.

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 398.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRED W. CRAMER, IRA B. CRAMER and CENTRAL PACIFIC RAILWAY COMPANY, a Corporation,
Defendants.

Amended Bill of Complaint.

To the Honorable Judges of the United States District Court, in and for the Northern District of California:

The United States of America, by Annette Abbott Adams, United States Attorney for the Northern District of California, acting by and under the direction of the Attorney General and by leave of this Court, brings this amended bill of complaint against Fred W. Cramer and Ira B. Cramer, residents and citizens of Siskiyou County, in the Northern District of California, and against the Central Pacific Rail-

way Company, a corporation organized and existing under and by virtue of the laws of the State of Utah and for cause of action complains and shows as follows:

I.

That for many years prior to July 21st, 1904, and from time immemorial, the following described lands were Indian lands, occupied, used, enjoyed, and claimed by the Indians, and that during all the said time, none of the [1*] rights and claims of said Indians in and to said lands and premises had been extinguished. That said lands are described as follows, to wit::

The northeast quarter (NE.¼) of section 23; the southeast quarter of the northwest quarter (SE.¼ NW.¼), northeast quarter of the southwest quarter (NE.¼ SW.¼), south half of the southwest quarter (S.½ SW.¼) and the west half of the southeast quarter (W.½ SE.¼) of section 13, township 43 north, range 8 west, M. D. M.

II.

That for the purpose of aiding in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, Oregon, there was granted by the Act of Congress of July 25, 1866 (14 Stats. at L. 239), to the California & Oregon Railroad, its successors and assigns, every alternate section of public land, said sections designated by odd numbers to the amount of twenty alternate sections per mile on each side of said railroad line, said sections, and every portion thereof, to be free

*Page-number appearing at foot of page of original certified Transcript of Record.

from all reservations and appropriations and all rights or claims in behalf of any individual or corporation at the time of the definite location of said road.

III.

That on the 7th day of August, 1871, the Central Pacific Railroad Company definitely located that portion of its line of road opposite the above-described lands, and filed a plat thereof in the office of the Commissioner of the General Land Office.

IV.

That by deed of conveyance dated July 29, 1899, the said defendant Central Pacific Railway Company became the successor in interest thereunder, to the said [2] Central Pacific Railroad in the matter of the issuance of patents under the grant by said Act of July 25, 1866.

That on July 21st, 1904, plaintiff issued to the said defendant Central Pacific Railway Company, a patent embracing the above-described lands.

V.

That the lands heretofore described in this bill of complaint are now, and have been for over forty years last past, occupied by Maggie Wall and Ellen Ruff, full-blooded Indians, and by George Wall, a half-breed.

That the said Indians have cleared the lands, built fences, barns and houses and other valuable improvements thereon, all of which was well known to all of the defendants prior to the issuing of said patent.

That the said Maggie Wall and the said Ellen Ruff, and their ancestors, have actually, uninter-

ruptedly and continuously occupied, used, cultivated, improved, enjoyed and claimed said described lands from a time prior to that of the definite location of said road by the said defendant Central Pacific Railway Company, or its predecessors in interest.

V–A.

The plaintiff further shows that the lands heretofore described in paragraph I of this bill are included within the limits of the reservation made for and in behalf of the Upper Klamath, Shasta, and Scott's River Tribes of Indians, by a treaty entered into on the 4th day of November, 1851, between certain chiefs, captains and head men of said Indians and Redick McKee, United States Indian Agent and Commissioner on the part of the United States, which said treaty was approved by the Commissioner of Indian Affairs and was transmitted by the [3] President of the United States to the Senate on the 1st day of June, 1852, where it was pending at the date of the grant made by the said Act of July 25, 1866, and also at the date of the definite location of the said railroad line. A copy of the said treaty is annexed hereto and made a part of this bill.

VI.

That the time when such definite location was made, to wit, on the 7th day of August, 1871, the lands described in the complaint were, by reason of the premises, reserved and appropriated for, and subject to the claims and rights of said Indians, and no right, title or interest whatsoever therein passed to the said companies under the said Act of July 25, 1866, or any other act.

VII.

That plaintiff further shows that the patents hereinbefore mentioned, as to all the lands hereinbefore specifically designated, were issued without authority of law, for the reason that at the time the line of said railroad was definitely fixed, the said described lands were Indian lands;

That in issuing the said patents affecting the said described lands, the officers or agents of the plaintiff acted by mistake and inadvertently, and that the said patent, as far as it purports to convey said lands hereinbefore described, to the said Central Pacific Railway Company, are void and of no effect as to these said Indians.

That said defendants Fred W. Cramer and Ira Cramer claim to have some right, title and interest in said land or to some part or portion thereof, and claim to have derived the same under and through the said defendant Central Pacific Railway Company. [4]

Your plaintiff is not informed, and is unable to state what portion of said land said defendants Fred W. Cramer and Ira Cramer claim, and that whatever alleged right, title, and interest said Fred W. Cramer and Ira Cramer claim, was so acquired with knowledge of the facts aforesaid, and therefore plaintiff prays discovery that said defendants Fred W. Cramer and Ira Cramer be compelled to set forth and state with particularity the portions of said lands, and right, title, or interest so claimed by them.

IN CONSIDERATION WHEREOF, and for as much as the plaintiff is without full and adequate

remedy in the premises save in a court of equity, plaintiff prays that the defendants may make full, true and direct answer to all and singular the matters and things hereinbefore set forth, as fully as if they had been particularly interrogated thereunto (but not under oath, his answer under oath being hereby expressly waived); that the said patent affecting said described lands be declared null and void, and be set aside, revoked, and held for naught, and be delivered up and surrendered by the said defendant Central Pacific Railway Company under the Court's command, for cancellation; that all of the said described lands may be adjudged and decreed to be the property of said Indians, free and clear of all claims of the defendants; that the said defendants during the progress of this cause, and thereafter, finally and perpetually may be enjoined from setting up any claim to the said lands or any part thereof, and from creating any cloud upon the Indians' title to the same, and that possession thereof may be restored to them and that they may have such other and further relief as may seem just to this Court and agreeable [5] to equity and good conscience.

S. W. WILLIAMS,
Special Asst. to Atty. General,
ANNETTE ABBOTT ADAMS,
United States Attorney,
FRANK M. SILVA,
Assistant United States Attorney,
Attorneys for Plaintiff. [6]

(R.)

TREATY MADE AND CONCLUDED AT CAMP, IN SCOTT'S VALLEY, SHASTA COUNTY, STATE OF CALIFORNIA, OCTOBER 6, 1851, BETWEEN REDICK M'KEE, ONE OF THE COMMISSIONERS ON THE PART OF THE UNITED STATES, AND THE CHIEFS, CAPTAINS AND HEAD MEN OF THE UPPER KLAMATH, SHASTA, AND SCOTT'S RIVER TRIBES OF INDIANS.

A treaty of peace and friendship made and concluded at camp, in Scott's Valley, Shasta County, California, between Redick McKee, one of the Indian agents specially appointed to make treaties with the various Indian tribes in California, on the part of the United States, and the undersigned chiefs, captains and head men now in council at this camp, representing the Upper Klamath, Shasta, and Scott's River Indians, residing severally in twenty-four, nineteen, and seven rancherias or villages, and known as the O-de-i-lah tribe or band, I-shack chief, from the Upper Klamath river; I-ka-ruck tribe or band, Tso-hor-git-sko chief; Ko-se-tah tribe or band, Ada-war-how-ik chief; I-da-kar-i-waka-ha tribe or band, I-da-kar-i-waka-ha chief; from Shasta Valley; Wat-sa-he-wa tribe or band, Ar-rats-a-cho-i-ca chief; E-eh tribe or band, An-na-nik-a-hok chief, from Scott's Valley.

Article 1. The said tribes or bands acknowledge themselves jointly and severally under the exclusive jurisdiction, authority and protection of the

United States, and hereby bind themselves to refrain hereafter from the commission of all acts of hostility or aggression towards the government or citizens thereof, to live on terms of peace and friendship among themselves and with all other Indian tribes which are now or may hereafter come under the protection of the United States.

Art. 2. To preserve the peace and friendship hereby established between the United States and the said tribes or bands, it is understood and agreed that for injuries received on either side, no private revenge or retaliation shall take place or be attempted; but instead thereof complaints shall be made by the party aggrieved to the other, through the Indian agent or sub-agent of the United States for their district, who shall investigate, and if practicable, [7] adjust the difficulty; and in case of acts of violence being committed upon the person or property of a citizen or citizens of the United States by an Indian or Indians belonging to or harbored by either of said tribes or bands, the party or parties charged with the commission of the crime shall be promptly delivered up when demanded of the chiefs by the said agent or a duly authorized officer of the county, to be tried for the alleged offence by the civil authorities of the State of California; and in case the crime has been committed by a citizen or citizens of the United States upon the person or property of an Indian or Indians of either of said tribes or bands, the agent shall take all proper measures to bring the offender or offenders to trial in the same way.

Art. 3. The said tribes or bands for and in consideration of the premises, and of the stipulations and promises hereinafter contained, hereby jointly and severally sell, cede, relinquish, and forever quitclaim to the United States, all their right, title, claim or interest of any kind which they or either of them have to the lands they now occupy, and to all other lands or soil in California.

Art. 4. To promote the permanent settlement and improvement of said tribes or bands, it is hereby stipulated and agreed that the following described tract or district of country shall be appropriated and set apart as an Indian reservation, and the use and possession thereof forever guaranteed to the said tribes or bands and their successors, equally with such other Indian tribes or bands and their successors, as the United States may hereafter remove from the waters of the Klamath or Trinity rivers or elsewhere in northern California, and settle thereupon, to wit: Commencing at a point on the easterly side of Scott's Valley, about six miles above the cabin or improvement generally known as Watson, Gee & Company's ranch, where two cedar trees stand upon the southwest side of a bald hill, and midway between the said cedars; thence running in a southwesterly direction across the said alley to a point projecting into the same, behind which stands a conical peak called Seino's Peak; thence [8] over the same and over said peak to the summit of the dividing ridge between the waters of Scott's and Klamath rivers; thence following the same to where a divide runs northward to a creek or large

brook entering the Klamath from the northward next above the one entering at Murderer's bar, and known as Indian creek; thence along said divide and across the Klamath river to the mouth of said creek; thence up the main fork of said creek to the forty-second parallel of north latitude; thence eastward along said parallel to a point due north of a point where the ridge dividing the waters of Scott's river from the waters of Humbug creek terminates at or near the Klamath; thence due south, crossing the Klamath river, to said point; thence following said divide and the divide separating the waters of Scott's river from the waters of Shasta river to a point in a line with the place of beginning, and thence southwesterly to said place of beginning; said tract being by estimation twenty-four miles in length from northwest to southeast by fifteen miles in average width, and containing between four and five square miles of tillable land. Provided, however, That those citizens of the United States who are now engaged in mining, raising, or washing gold upon that part of Scott's river lying between the first creek entering the same from the north, above the town of Scott's bar and the mouth of said river, shall be permitted to hold and work the claims of which they are now in actual possession for the term of two years from the date of this instrument, unless sooner exhausted; and Provided further, That such other citizens of the United States as have already thrown up earth or raised ore on any other part of said reserve shall be allowed until the first day of June next to wash the same, and that

those having cabins or other improvements already erected on said reservation shall be permitted to occupy and enjoy the same, free from molestation, until said first day of June, eighteen hundred and fifty-two, and no longer. It is also further provided, That the said tribes or bands shall never sell or alienate their right or claim to any part thereof except to the United States, nor shall they ever lease to or permit white men to settle, work, or trade upon any [9] part thereof without the written permission of the United States Indian agent for the district. It is agreed and understood, however, that the United States reserves the right of way over said lands, and of using for farming purposes any quantity thereof not exceeding one thousand acres; also the right to establish such military post or posts, erect such buildings, and make such other improvements for the accommodation of an Indian agent and other officers or servants as the President may direct.

Art. 5. The said tribes or bands agree and hereby bind themselves to remove to and settle permanently upon said reservation, within two years from the date hereof, or sooner if thereto required by the Indian agent of the United States; and whenever said removal and settlement shall take place, the United States with a desire to encourage them in acquiring a knowledge of letters, agriculture, and the mechanic arts, will employ and settle among them upon said reservation, one principal school-teacher, with three male and female assistant teachers to instruct said tribes in the different branches

of a common-school education and in the domestic arts of sewing and housekeeping, upon the manual labor system; also one practical farmer who shall assist said tribes in cultivating the soil and act as superintendent of agricultural operations, with two assistant farmers, one carpenter or worker in wood who shall direct and aid in the construction of houses, repairing wagons, etc., and one blacksmith or worker in iron also to be employed for their assistance and convenience; all of the above teachers, farmers and mechanics to be paid and maintained upon said reservation by the United States for the period of five years, and as long thereafter as the President may deem advisable; also, that the United States will erect suitable dwellings, school-houses and shops for the accommodations of an agent, and of the teachers, farmers and mechanics above specified, and storehouses for the protection of the public property.

Art. 6. The United States will also appoint and settle among said tribes upon said reservation, an agent or subagent of the [10] Indian department to carry out the stipulations of this treaty and the general laws and regulations of the Indian department pertaining to the government and improvements of said tribes; and until the United States shall have established a military post on or in the neighborhood of said reservation, with a regular physician or surgeon attached thereto, the United States Indian agent for the district shall be authorized, and is hereby directed to employ at the expense of the United States, an experienced physician to

reside on said reservation, attend to the sick among either whites or Indians, and especially to vaccinate the members of each tribe; and when said military post shall be established, the services of the surgeon thereto attached may be substituted by said agent for those of the physician first employed, allowing him thereafter a reasonable compensation.

Art. 7. To aid said tribes or bands in their subsistence while removing to and making their settlement upon said reservation, the United States, in addition to twelve head of beef cattle, twenty sacks (one thousand pounds) of flour, and numerous other presents of blankets, shirts, etc., given to them at this camp, will furnish them, free of charge, during each of the years 1852 and 1853, with two hundred head of beef cattle, to average in weight five hundred pounds net, and two hundred sacks (equal to twenty thousand pounds) of flour, five hundred pair of two and a half point Mackinaw blankets, five hundred pairs strong pantaloons, five hundred cotton (hickory) shirts, five hundred red flannel shirts, six hundred linsey gowns for women and girls, three thousand yards calico, three thousand yards 4–4 brown sheetings, twenty-five pounds Scotch thread, five thousand needles, assorted, one gross of thimbles, ten pounds of pins, twelve dozen scissors, fifty dozen common size butcher-knives, five hundred pea-jackets of heavy, strong cloth, assorted, one thousand pounds of salt, one hundred hatchets, all to be distributed among them by the agent, according to their respective numbers.

Art. 8. As early as convenient after the ratifica-

tion of this treaty by the President and Senate, and the settlement of said tribes [11] or bands upon said reservation, the United States will also furnish them with twenty-four brood mares, and one stallion, thirty milch cows and one bull, fifty sheep, ten hogs (both sexes), four yoke of work cattle, with yokes, chains, etc., two breaking-ploughs, ten small ploughs, two ox wagons, one mule wagon, seeds of all proper kinds for sowing and planting, eight work mules or horses with harness, one hundred heavy spades, twelve mattocks, four hundred garden or corn hoes, two hundred chopping axes, with handles, two hundred sheet-iron camp-kettles, first size, two hundred sheet-iron camp-kettles, second size, four hundred tin pans (two hundred large size, two hundred small size), one set of blacksmithing tools, one set carpenter's tools, three thousand pounds of iron, five hundred pounds of steel, assorted, fifty dozen pint tin cups, fifty dozen tin plates, fifty dozen iron-lined spoons, three United States flags. The stock enumerated above, and the product thereof, together with the farming utensils and mechanical tools to be held as the joint property of said tribes or bands, the former to be marked or branded with such letters or marks as will at all times designate the same to be their property, and no part or portion thereof shall be killed, exchanged, sold, or otherwise parted with, without the assent and direction of the agent.

Art. 9. It is further agreed that the United States will fence in with a good board or post and rail fence, preparatory to breaking up the soil for

planting, one thousand acres of land; and if, by the year 1853, the said tribes or bands shall not be in a situation to provide themselves with food and clothing, and the agent for their district shall so recommend, the President, in his discretion, may order for their use, in the year 1854, a like or smaller quantity of the articles enumerated in article 7 to be provided for the years 1852 and 1853.

Art. 10. It is further understood and agreed that within the line of the reservation referred to and described in article 4, there shall be retained and set apart a belt or border of one mile in width on the eastern and southern sides or lines thereof, whereon it shall not be lawful for either Indians or white men to settle on [12] or remain, or to pass over except by the highways or roads running through the same, but the same shall be exclusively within the jurisdiction of the United States.

Art. 11. The said tribes or bands hereby bind themselves to deliver up within sixty days from the date hereof, all horses, mules, or other property which may be in their possession, stolen from the whites, the claimants making proof of ownership before the agent or such person as he may designate to act in his absence, or before a magistrate or Judge of the county of Shasta; all such property claimed but not clearly identified, to be returned to the Indians.

In testimony whereof, the parties have hereunto signed their names and affixed their seals, this

fourth day of November, anno Domini eighteen hundred and fifty-one.

REDICK McKEE,
United States Indian Agent. (Seal)

For and in behalf of the O-de-i-lah tribe or band from the Upper Klamath river:

I-SHACK, His X Mark. (Seal)
E-EH-NE-QUA, His X Mark. (Seal)
PI-O-KUKE, His X Mark. (Seal)
SA-NAK-A-HA, His X Mark. (Seal)

For and in behalf of the I-Ka-ruck tribe or band in Shasta Valley:

TSO-HOR-GIT-SKO, His X Mark. (Seal)
CHE-LE-NA-TUK, His X Mark. (Seal)

For and in behalf of the Ko-se-tah tribe or band in Shasta Valley:

ADA-WAR-HOW-IK, His X Mark. (Seal)
QUAP-SOW-A-HA, His X Mark. (Seal)

For and in behalf of the Ida-kar-waka-ha tribe or band in Shasta valley:

A-LAT-SE-WAK-A-NA, His X Mark. (Seal)
IDA-KAR-I-WAK-A-HA, His X Mark. (Seal)

For and in behalf of the Wat-sa-he-wa tribe or band in Scott's valley:

AR-RATS-A-CHO-I-CA, His X Mark. (Seal)

For and in behalf of E-eh tribe or band in Scott's valley:

AN-NA-NIK-A-HOK, His X Mark. (Seal)

SUN-RISE, His X Mark. (Seal)

[13]

Signed, sealed and delivered, after being fully explained, in presence of—

JOHN McKEE,
Secretary.

GEORGE GIBBS,
LINDLEY ABEL,
Interpreters.

W. T. SMITH.
F. H. McKINNEY.
C. McDERMIT.
SAMUEL FLEMING.
WALTER McDONALD.
C. FULTON.
WM. H. BURGESS.
EDWARD HICKS.
WILLIAM DAIN.
LIRY SWAN.
GEO. W. TAIT.

Due service of the within amended bill of complaint is hereby admitted this 23d day of June, 1919.

FRANK THUNEN,
E. J. FOULDS,
Attorneys for Defendants.

It is hereby stipulated that the within bill may

be filed, and that the motion to dismiss now on file may apply thereto.

June 23d, 1919.

FRANK THUNEN,
E. J. FOULDS,
Attys. for Defendants.

S. W. WILLIAMS,
ANNETTE ABBOTT ADAMS,
FRANK M. SILVA,
Attys. for Plff.

[Endorsed]: Filed Jun. 23, 1919. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [14]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 398.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRED W. CRAMER, IRA B. CRAMER, and CENTRAL PACIFIC RAILWAY COMPANY, a Corporation,
Defendants.

Motion to Dismiss Bill of Complaint.

The defendants above named make and file this motion to dismiss the bill of complaint in the above-entitled suit upon each of the following grounds:

1st. That the said bill of complaint does not set

forth facts sufficient to constitute a cause of action in equity, or otherwise, against the defendants, or at all.

2d. That the said bill of complaint does not set forth any equity or cause entitling the plaintiff to the discovery thereby sought, or to any discovery, or any relief whatsoever against these defendants or at all.

3d. That the said bill of complaint does not set forth any matter or equity, or any fact, entitling the Indians therein named, to wit, Maggie Wall, Ellen Ruff, or the half-breed, George Wall, or any of said named persons, or any other person to the relief [15] therein prayed, or to any relief whatsoever.

4th. That the alleged ground of failure of defendants' title to the lands described in the bill of complaint is expressly and solely based upon the misconstruction and misstatement in said bill of complaint of a public statute of the Congress of the United States, to wit, an act entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon," approved July 25th, 1866 (14 Stat. L. p. 239), and that a correct statement of said statute would defeat said cause on the face of said bill of complaint.

5th. That the said bill of complaint is uncertain in this: That the lands described in said bill of complaint are denominated "Indian lands"; but that said term has no definite meaning, and there is no allegation in said bill of complaint of any

title in any Indian, or any group, or band, or tribe, of Indians, or in any person other than defendant Central Pacific Railway Company, and there is no fact alleged to support the conclusion of law expressed in said bill of complaint that the patent from the United States of America unto Central Pacific Railway Company embracing the lands described in said bill of complaint was issued without authority of law.

6th. That it appears from the allegations of said bill of complaint that any cause, or causes of suit shown or sought to be shown thereby are barred by the first section of the Act of Congress approved March 2, 1896, entitled "An Act to provide for the extension of time within which suits may be brought to vacate and annul land patents, and for other purposes"; and also by the provisions of the Act of Congress of March 3, 1891, Vol. 26, United States Statutes [16] at Large, page 1093.

7th. That the said suit is barred by the long delay, neglect and laches of the plaintiff in bringing the same.

WHEREFORE these defendants move and pray that the said bill of complaint be dismissed, and that defendants be not required to make further answer thereto.

Dated, July 18, 1918.

FRANK THUNEN,
W. M. SINGER,
Attorneys for Defendants.

Service of the within motion is admitted this 18th day of July, 1918.

ED. F. JARED,
Attorney for Plaintiff.

[Endorsed]: Filed Jul. 18, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [17]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 398.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRED W. CRAMER, IRA B. CRAMER, and CENTRAL PACIFIC RAILWAY COMPANY, a Corporation,
Defendants.

Motion to Make More Definite and Certain.

The defendants above named, not waiving any right under their motion to dismiss the bill of complaint, which, by stipulation has been extended to the amended bill of complaint in the above-entitled matter, make and file this their motion under equity rule 20 to require plaintiff to make a more particular and definite statement in the bill of complaint as to the ground upon which plaintiff seeks the cancellation of the patent to defendant Central

Pacific Railway Company, mentioned in said amended bill of complaint.

Said motion is based upon the uncertainty and ambiguity of said amended bill of complaint in the following particular:

It is averred as a conclusion that at the time the title of defendants and their predecessors would otherwise have attached to the lands described in said complaint, the said lands were reserved and appropriated for, and subject to the claims and rights of certain Indians, but it cannot be ascertained whether such claims and rights are based upon the alleged continued occupation [18] by Maggie Wall and Ellen Ruff and George Wall as averred in paragraph V of said amended bill of complaint, or whether the said claims and rights are based upon the inclusion of the said lands within the boundaries of the alleged reservation under the proposed treaty between certain bands or tribes of Indians and the United States of America, as averred in paragraph V-A.

WHEREFORE these defendants move and pray that the plaintiff above named may be required to make a further and better and more particular statement of the nature of its claim as to the ground upon which the conclusion is based that the patent issued to defendant Central Pacific Railway Company on July 21, 1904, covering the lands described in said amended complaint, should be canceled.

Dated, July 1, 1919.

FRANK THUNEN and
W. M. SINGER,
Attorneys for Defendants.

Service of the within motion is admitted this 1st day of July, 1919.

ANNETTE ABBOTT ADAMS,
Attorney for Plff.

[Endorsed]: Filed Jul. 1, 1919. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [19]

At a stated term, to wit, the July term, A. D. 1919, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the court-room in the City and County of San Francisco, on Monday, the 14th day of July, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 398—EQUITY.

UNITED STATES OF AMERICA
vs.
FRED W. CRAMER et al.

(Order Denying Motion to Dismiss First Amended Bill of Complaint and Denying Motion to Make First Amended Bill of Complaint More Definite and Certain.)

Defendants' motion to dismiss amended bill and

motion to make amended bill more certain came on to be heard and after arguments being submitted it was ordered that said motions be and they are hereby denied, with leave to answer in twenty days. [20]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 398.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRED W. CRAMER, IRA B. CRAMER, and CENTRAL PACIFIC RAILWAY COMPANY, a Corporation,

Defendants.

Answer to Amended Complaint.

Defendants above named answering the amended bill of complaint in the above-entitled cause:

I.

Deny that for many years prior to July 21, 1904, or from time immemorial, or for any time, any part of the lands described in subdivision I of the amended bill of complaint were Indian lands, or that any part thereof was occupied, used, enjoyed, or claimed by the Indians, except as hereinafter averred, or that during all or any of said time any right or claim of said Indians existed, except as hereinafter averred.

II.

Admit that there was granted to the predecessor in interest of Central Pacific Railway Company by the Act of Congress approved July 25, 1866 (14 Stat. L. 239), its successors and assigns, every alternate section of public land designated by odd numbers to the amount of twenty alternate sections per mile on each side of said railroad line, but deny that said grant was limited to sections or parts of sections free from all reservations or appropriations or all rights or claims on behalf of any individual or corporation [21] at the time of the definite location of said road. In this behalf defendants aver that the said grant was by section 2 of said act of Congress extended to twenty alternate sections per mile (ten on each side) of said railroad line, not granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, at the time of the definite location of said railroad line.

III.

Admit that on the 7th day of August, 1871, the predecessor in interest of defendant Central Pacific Railway Company filed in the office of the Commissioner of the General Land Office a map of that portion of its road opposite the lands described in subdivision I of the amended bill of complaint.

IV.

Admit and aver that by deed of conveyance dated July 29, 1899, defendant Central Pacific Railway Company became the successor in interest of the grantee railroad company under said Act of Con-

gress of July 25, 1866, and that on July 21, 1904, plaintiff issued to said defendant Central Pacific Railway Company a patent embracing the lands described in subdivision I of the amended complaint, which said lands are situate within the primary limits of the said grant.

V.

Defendants are without knowledge as to the length of time or the precise territorial extent of the occupation by the Indians of the said lands described in subdivision I of the amended bill of complaint, or of the particular individual Indians or half-breeds who have occupied the said lands or portions thereof during said period.

Admit that some, but deny that all, of the said lands have been cleared and improved, but defendants are without knowledge as to the identity of the Indians or other persons who cleared [22] the said lands and constructed the said improvements; and defendants deny that the said defendants, or any thereof, knew of the said occupation or clearing or improving of the said lands prior to the issuance of said patent.

Deny that Maggie Wall or Ellen Ruff, or their ancestors have actually, uninterruptedly or continuously occupied, used, cultivated, improved, enjoyed or claimed said described lands from the time prior to that of the definite location of said railroad by the defendant Central Pacific Railway Company, or its predecessors in interest. In this behalf defendants aver upon their information and belief that none of said Indians named in the

amended complaint, nor their ancestors ever occupied the said lands, or any part thereof, until a time subsequent to the definite location of the said line of railroad by the predecessor of the defendant Central Pacific Railway Company opposite the said lands.

Defendants aver further that during several years past the said occupancy of said lands by said Indians has been under and pursuant to lease from defendant Central Pacific Railway Company to the plaintiff, the United States of America, and under no other right or claim.

VI.

Deny that the lands described in paragraph I of said amended complaint, or any part thereof, are included within the limits of the alleged Indian reservation mentioned in paragraph V–A of the amended bill of complaint, or any reservation, or proposed reservation. [23]

Defendants deny that the said proposed treaty was pending in the United States Senate or elsewhere at the date of the grant made to the predecessor of defendant Central Pacific Railway Company by Act of Congress, approved July 25th, 1866, or at the date of the definite location of the said railroad line opposite the said lands described in subdivision I of the amended bill of complaint. In this behalf defendants aver that the said proposed treaty had been expressly rejected by the United States Senate and definitely and finally disapproved and repudiated by Congress and by the Department of the Interior long prior to July 25th, 1866.

VII.

Deny that at the time when such definite location of said road was made, to wit, on August 7th, 1871, the said land described in subdivision 1 of the amended bill of complaint, or any part thereof, was, by reason of anything alleged in the amended bill of complaint, or otherwise, reserved, or appropriated for any Indians or for any other purpose, or that the said land or any part thereof was subject to any claim or right of any Indian or Indians; and deny that no right, title or interest therein passed to the predecessor of Central Pacific Railway Company under the said Act of July 25th, 1866. In this behalf defendants aver that the fee title to the said land, and the whole thereof, passed to the predecessor of defendant Central Pacific Railway Company from the United States by virtue of the said Act of Congress of July 25th, 1866, and is now owned and held by defendant Central Pacific Railway Company, subject to an executory contract of sale to the defendants Cramer.

VIII.

Deny that the patent mentioned in said bill of complaint for the said described lands, or any patent therefor, was issued without authority of law, for the reason that the said lands were [24] Indian lands at the time of definite location of said road or for any other reason; but defendants aver that said patent was issued by authority of congressional mandate and that the lands covered thereby, and the whole thereof, were of the character specified in the said granting act of Congress and that the fee title

thereto was conveyed to the predecessor of defendant Central Pacific Railway Company by the said grant and confirmed in defendant Central Pacific Railway Company by the said patent of July 21st, 1904.

And defendants deny that in issuing the said patent the officers or agents of the plaintiff acted by any mistake or inadvertently, or that the said patent, or any patent, is void or of no effect as to the said Indians or as to plaintiff or as to any person; but avers that said patent is a valid and final determination of fee title in defendant Central Pacific Railway Company as against the plaintiff and the Indians and the whole world.

Admit that defendants Fred W. Cramer and Ira Cramer claim some right and interest in said land and to the whole thereof, having derived the said interest and claim through the defendant Central Pacific Railway Company, but deny that said interest or claim or right was acquired with knowledge of any fact or alleged fact averred in said amended bill of complaint and herein denied by defendants.

Defendants aver further than on February 5th, 1917, the whole of said described lands in section 13, township 43 north, range 8 west, Mount Diablo Meridian, was sold under executory contract No. 1847–F by defendant Central Pacific Railway Company to defendants Fred W. Cramer and Ira B. Cramer, subject to them pending lease No. 4066–F from defendant Central Pacific Railway Company to the United States of America, said lease being for the benefit of the aforesaid Indians who then occupied the said [25] lands under the said lease and un-

der no other right or claim whatsoever. Defendants further aver that on October 25th, 1916, the lands in section 23, township 43 north, range 8 west, Mount Diablo Meridian, described in subdivision I of the amended bill of complaint were sold under executory contract No. 1808–F by defendant Central Pacific Railway Company to defendants Fred W. Cramer and Ira B. Cramer, subject to lease No. 5694–F from defendant Central Pacific Railway Company to United States of America, covering the lands in said subdivision occupied by the said Indians, said occupancy being under and pursuant to the said lease, and no other right or claim.

For a further, second and separate defense to the claim asserted in the amended bill of complaint herein:

I.

Defendants aver that said amended bill of complaint does not state facts sufficient to constitute a valid cause of action in equity, or otherwise, in this; that is to say:

(a) Said amended bill of complaint, in subdivision II thereof, misstates the character of lands included within the terms of the said grant made by the act of Congress of July July 25th, 1866 (14 Stat. L. 239), to the California and Oregon Railroad Company, predecessor of defendant Central Pacific Railway Company, and that in so far as said cause is predicated upon occupation of said lands by the said Maggie Wall and Ellen Ruff, full-blooded Indians, and by George Wall, a half-breed, or any thereof, or their ancestors, said amended bill does not state

a cause of action or any ground for the cancellation of the said patent issued by the United States of America to defendant Central Pacific Railway Company on July 21st, 1904, or any ground for any relief prayed in the amended bill of complaint; and [26]

(b) In so far as said cause or claim for relief is based or predicated upon the alleged treaty between the United States of America and the Upper Klamath, Shasta and Scott's River tribes of Indians, set forth in said amended bill of complaint, said amended bill of complaint does not state facts sufficient to constitute a cause of action in equity, or otherwise, for the reason that the said proposed treaty never was ratified, but was definitely disapproved and repudiated by the United States of America long prior to the date of the grant made by said Act of Congress of July 25th, 1866, and long prior to the date of definite location of the said railroad line opposite the lands described in subdivision I of said amended bill of complaint, and said proposed treaty was not pending in the United States Senate or elsewhere on either of said dates for the reason that said proposed treaty had theretofore been definitely and finally disapproved, repudiated and abrogated by the United States of America, as appears by the public statutes enacted prior to said time by the Congress of the United States; and prior to the time of attachment of title under said grant made to predecessor of defendant Central Pacific Railway Company by the said Act of July 25th, 1866, the Congress of the United States had by public statute abrogated the treaty making

power with Indians, and there then existed no law under which said proposed treaty could have been lawfully pending before the United States Senate, or elsewhere.

For a further, third and separate defense to the claim asserted in the amended bill of complaint herein:

I.

Defendants aver that it appears upon the face of said amended bill of complaint that plaintiff is without capacity to maintain the said action for the reason that it is therein averred that the Indians in whose behalf said suit is brought have never been [27] disturbed in their possession and occupancy of the said lands.

It also appears upon the face of said amended bill, and these defendants aver, that there is not now, and there never has been, an existing Indian reservation as contemplated by said proposed treaty, or otherwise; and no Indian claim or Indian right is averred in said amended bill of complaint upon which the plaintiff is authorized under any law to maintain any action on behalf of the said Indians.

For a further, fourth and separate defense to the claim asserted in the amended bill of complaint herein:

I.

Defendants aver that said cause is barred by the Act of March 3d, 1891 (26 Stat. L. 1099), providing

> "That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the pas-

sage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

For a further, fifth and separate defense to the claim asserted in the amended bill of complaint herein:

I.

Defendants aver that said action is barred by the Act of March 3d, 1896 (20 Stat. L. 42), providing that

"Suits to annul patents erroneously issued under railroad or wagon road grants. That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this Act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to any lands held by a *bona fide* purchaser shall be vacated or annuled, but the right and title of such purchaser is hereby confirmed." [28]

Wherefore these defendants pray that plaintiff be denied relief sought by the said amended bill of complaint, or any relief, and that it be adjudged

and decreed by this Court that the patent issued by the United States of America unto the defendant Central Pacific Railway Company on July 21, 1904, is valid, and that, subject to executory contract of sale to defendants Fred W. Cramer and Ira B. Cramer, defendant Central Pacific Railway Company is the owner in fee simple of the whole of the lands described in subdivision I of the said amended bill of complaint, to wit: The northeast quarter (NE.¼) of section 23; the southeast quarter of the northwest quarter (SE.¼ of the NW.¼), the northeast quarter of the southwest quarter (NE.¼ of the SW.¼), south half of the southwest quarter (S.½ of the SW.¼) and the west half of the southeast quarter (W.½ of the SE.¼) of section 13, township 43 north, range 8 west, Mount Diablo Meridian.

FRANK THUNEN and
W. M. SINGER,
Attorneys for Defendants.

Service of the within Answer is admitted this 4th day of August, 1919.

ANNETTE ABBOTT ADAMS,
FRANK M. SILVA,
Attorneys for Plaintiff.

[Endorsed]: Filed August 4, 1919. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [29]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 398—IN EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRED W. CRAMER, IRA B. CRAMER and CENTRAL PACIFIC RAILWAY COMPANY, a Corporation,

Defendants.

Second Amended Bill of Complaint.

To the Honorable the Judges of the United States District Court in and for the Northern District of California, Ninth Circuit of the United States:

The United States of America, in its own right and as guardian of its Indian wards hereinafter named, by its undersigned solicitor acting herein by and under the direction of the Attorney General, with leave of Court first had and obtained, brings this its second amended bill of complaint against Fred W. Cramer and Ira B. Cramer, residents and citizens of Siskiyou County, in the Northern Division of the Northern District of California, and against the Central Pacific Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Utah, and for cause of action alleges:

I.

That for many years prior to July 21, 1904, and from time immemorial, the following described lands were Indian Lands, occupied, used, enjoyed, improved and claimed by the Indians, and that during all of said time none of the [30] rights and claims of said Indians in and to said lands had been extinguished, the said lands being described as follows, to wit:

> The northeast quarter (NE.¼) of section twenty-three (23); the southeast quarter (SE.¼) of the northwest quarter (NW.¼), the northeast quarter (NE.¼) of the southwest quarter (SW.¼), the south half (S.½) of the southwest quarter (SW.¼), and the west half (W.½) of the southeast quarter (SE.¼) of section thirteen (13), township forty-three (43) north, range eight (8) west, Mount Diablo base and meridian, Siskiyou County, Northern District of California.

II.

That for the purpose of aiding in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, Oregon, there was granted by the Act of Congress of July 25, 1866 (14 Stat. 239), to the California and Oregon Railroad, its successors and assigns, every alternate section of public land designated by odd numbers, to the amount of twenty (20) alternate sections per mile on each side of said railroad line. Said Act further provided that:

When any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of the first named alternative sections.

III.

That on August 7, 1871, the Central Pacific Railroad Company definitely located that portion of its line of road opposite the above-described lands and filed a plat thereof in the office of the Commissioner of the General Land Office. [31]

IV.

That by deed of conveyance dated July 29, 1899, the said defendant Central Pacific Railway Company became the successor in interest thereunder of the Central Pacific Railroad Company in the matter of the issuance of patents under the grant by the said Act of July 25, 1866; and that on July 21, 1904, the plaintiff issued to the said defendant Central Pacific Railway Company a patent embracing the above-described lands.

V.

That the lands heretofore described in this bill of complaint are now and have been for a long time prior to the grant for the said railroad occupied by Maggie Wall and Ellen Ruff, full-blood Indians,

and by George Wall, a half-breed and husband of said Maggie Wall, wards of the United States; that the said Indians have cleared the lands, built fences, barns and houses thereon, and made other valuable improvements upon the same, all of which was well known to all of the defendants prior to the issuing of said patent by the United States; that the said Maggie Wall and Ellen Ruff, and their ancestors, have actually, uninterruptedly and continuously occupied, used, cultivated, and improved said lands and have enjoyed and claimed the same from a time prior to the grant for the railroad aforesaid, and long prior to the definite location of said road by the said defendant Central Pacific Railway Company or its predecessors in interest; that the Indian right of occupancy of public lands has always been held sacred by the United States and can be properly disturbed and determined only by the United States, and the United States never interfered in any manner with the occupation and use that has been maintained of these [32] lands by said Indians.

VI.

That by reason of the actual use and occupation of said lands by the said Indians the same were reserved and appropriated, and no right, title or interest whatsoever therein passed under the grant for the railroad by the said Act of July 25, 1866, or any other act.

VII.

Plaintiff further shows that the patent hereinbefore mentioned as to the lands above described

was issued without authority of law, for the reason that at the time the line of said railroad was definitely fixed and at the time the grant was made the above described lands were reserved for the Indians who occupied the same; that in issuing the said patent the officials and agents of the plaintiff acted by mistake and inadvertently, and that said patent, in so far as it purports to convey said land to the said Central Pacific Railway Company, is void and of no effect as to said Indians.

VIII.

That said defendant Central Pacific Railway Company, by executory contracts dated February 5, 1917, and October 5, 1916, assumed to sell said lands hereinbefore described to the defendants Fred W. Cramer and Ira B. Cramer, who by reason thereof are asserting an interest in the lands.

In consideration whereof and forasmuch as the plaintiff is without full and adequate remedy in the premises save in a court of equity, plaintiff prays that the defendants may make full, true and direct answer to all and singular the [33] matters and things hereinbefore set forth as fully as if they had been particularly interrogated thereunto, but not under oath, their answer under oath being hereby expressly waived; that the said patent affecting said described lands and the executory contracts of sale above mentioned be declared null and void and be set aside, revoked and canceled, and be delivered up and surrendered by the said Central Pacific Railway Company under the Court's command for cancellation; and that the defendants

be decreed to have no right, title or interest in and to any of said lands. Or, if for any cause such relief should be denied, a decree be entered protecting the Indian occupants in their possession and use of said lands, and enjoining the defendants from interfering in any manner with such occupancy, use and possession so long as the same may be maintained by the Indians and their heirs; and that the plaintiff may have such other and further relief as may seem just to this Court and agreeable to equity and good conscience.

(Sgd.) S. W. WILLIAMS,
Special Assistant to the Attorney General,
Solicitor for the United States.

[Endorsed]: Filed Sept. 4th, 1920. Walter B. Maling, Clerk. [34]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

Hon. FRANK S. DIETRICH, Judge.

IN EQUITY—No. 398.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRED W. CRAMER, IRA CRAMER and CENTRAL PACIFIC RAILWAY COMPANY, a Corporation,
Defendants.

Opinion.

S. W. WILLIAMS, Special Assistant to the Attorney General, and FRANK M. SILVA, United States Attorney, for Plaintiff.

FRANK THUNEN and W. M. SINGER, of San Francisco, for Defendants.

DIETRICH, District Judge.

By the Act of July 25, 1866 (14 Stat. 239), Congress granted to the California & Oregon Railroad Company, and its successors, certain odd-numbered sections along the line of a road to be constructed, excepting from the grant only such lands as had been "granted, reserved, occupied by homestead settlers, or otherwise disposed of." The line of the road was definitely located on August 7, 1871, and by virtue of such location sections thirteen (13) and twenty-three (23), in township forty-three (43) N., range eight (8) W., D. M., [35] Siskiyou County, California, came within the scope of the grant. On July 29, 1899, the defendant, Central Pacific Railway Company, succeeded to all the rights of the California & Oregon Company, and upon July 21, 1904, it received a patent conveying to it the two sections described. The suit is brought by the Government, primarily for the purpose of cancelling the patent in so far as it relates to the northeast quarter (NE.¼) of section 23, and the southeast quarter of the northwest quarter (SE.¼-NW.¼), northeast quarter of the southwest quarter (NE.¼ SW.¼), south half of the southwest quar-

ter (S.½ SW.¼), and west half of the southeast quarter (W.½ SE.¼), of section 13, upon the ground, principally, that in issuing it the Land Department was without jurisdiction for the reason that at the time the Act was passed, and also when the line of road was definitely located, these subdivisions were a part of an Indian Reservation provided for in an Indian treaty, pending before the Senate for ratification. This treaty was entered into on November 4, 1851, by one Redick McKee, acting for the Government, with certain Indians in Northern California, and together with seventeen other similar treaties was transmitted to the Senate by the President on July 1, 1852. After consideration there it was rejected on July 8, 1852. Hence it was not pending when the granting Act was passed or when the line of road was definitely located. Furthermore, there is no evidence that either the Indians or the Executive Department ever took any action under the proposed treaty or that after its rejection by the Senate either the Indians or any Department of the Government ever considered the proposed reservation as having any existence either in law or in fact. Perhaps it should be added that the proposed reservation did not extend to the lands in controversy. [36]

Therefore, so far as the plaintiff's contention rests upon the assumption of the existence of an Indian reservation, or the pendency of a treaty providing for one, it is without merit.

There is a further claim that the lands were in the actual possession of individual Indians both in

1866 and when the line of road was definitely located. In this respect the evidence shows beyond doubt that as early as 1859 Ellen Ruff and Maggie Wall, full-blooded Indians, and the latter's husband, George Wall, a half-breed, were, as children, living with their parents upon the lands and that they have resided there continuously up to the present time. They have under fence between 150 and 175 acres, in an irregularly shaped tract, lying along a creek which runs diagonally through the two sections, and have irrigated and cultivated portions thereof. They have also constructed and maintained dwelling-houses and divers outbuildings. In short, it cannot be questioned that they have actually resided upon the lands and improved them for the purpose of making for themselves homes. This possession raises a presumption of title (Revised Statutes U. S., section 2126).

While at the time the granting act was passed and when the line of road was definitely located there were no express statutes authorizing Indians in their individual capacity to acquire title to lands either by pre-empting or homesteading them, in view of the well known desire of the Government that Indians abandon their nomadic life and take up places of fixed abode and adopt the habits of civilization, it is difficult to believe that by the grant in question Congress intended to wrest from individual Indians, without compensation, homes which in good faith they had selected and improved upon public lands recognized as a part of the Indian country. It may be conceded [37] that the right

was only one of occupancy and that, as the law stood at that time, it could not ripen into title. But even so it was a substantial right which was respected by the Government and was not to be invaded by private individuals without authority of law, and hence may very well be regarded as falling within the excepting terms, "reserved . . . or otherwise disposed of." It is accordingly held that such title as the railroad company acquired is subject to the Indian right of occupancy which can be interfered with or terminated only by the United States. Beecher vs. Weatherby, 95 U. S. 517, 525; U. S. vs. Thomas, 151 U. S. 577; Swamp Grant—Wisconsin, 19 L. D. 518.

For over forty years after the line of road was definitely located the railroad company did not question this right of occupancy and for ten years after the patent was issued no steps were taken in hostility thereto. Thereupon, seemingly without knowledge of the Indians and without investigation on the part of the Indian Department, the latter accepted leases from the railroad company for a nominal consideration; but it is not thought that the rights either of the Indians or of the Government were prejudiced by such action. Neither is it perceived how the rights of the occupants were affected by their failure to assert them in the manner prescribed by sections eight and thirteen of the Act of March 3, 1851 (9 Stat. 631). There is no evidence that these Indians occupied the lands or claimed any rights therein at the time of the treaty with Mexico.

If the view I have taken is correct there can be no serious question of the capacity of the Government to maintain the action. The personal status of the occupants, whatever that may be, is not the controlling consideration. We are [38] concerned with the status of the land, and if there is a right of occupancy in the Indians subject only to the control of the Government, its interest and its obligations are such as to warrant it in applying to the courts for protection against unlawful interference or invasion by private individuals.

Counsel for plaintiff may prepare a decree declaring the right of the Indian occupants to remain in possession until otherwise directed by the United States, of the lands, but only the lands, actually enclosed by fence as shown by the map, Plaintiff's Exhibit 1, provided that the whole of the northeast quarter of the southwest quarter (NE. ¼ SW. ¼) of section thirteen (13) may be included and no part of the northwest quarter of the southwest quarter (NW. ¼ SW. ¼) or the southwest quarter of the northeast quarter (SW. ¼ NE. ¼) of section thirteen (13). The whole of the northeast quarter of the southwest quarter (NE. ¼ SW. ¼) of section thirteen (13) is included because it appears that there are some improvements on the small portion thereof not enclosed.

[Endorsed]: Filed Sept. 10, 1920. Walter B. Maling, Clerk. [39]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 398.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRED W. CRAMER, IRA B. CRAMER, and CENTRAL PACIFIC RAILWAY COMPANY, a Corporation,

Defendants.

Decree.

This cause came on to be heard at this term and was argued by counsel and thereupon, upon consideration thereof, IT IS ORDERED, ADJUDGED AND DECREED as follows:

That when the grant was made by the Act of July 25, 1866, 14 Stats. at Large, 239, to aid in the construction of a railroad from the Central Pacific Railroad in California to Portland, Oregon, the lands hereinafter described were occupied by Maggie Wall and Ellen Ruff, full-blood Indians, and their ancestors, and that the said Indians have continuously occupied, used, improved and enjoyed said lands up to the present time. The lands referred to are particularly described as follows: The tract containing 21.24 acres in the southwest quarter of the northeast quarter and the east half of the northeast quarter of section 23, township 43 north, range 8 west, Mount Diablo Meridian, Cali-

fornia, bounded as follows: beginning at a point from which the corner of sections 13, 14, 23 and 24 bears north 651 feet; running thence south 18 degrees west 36 feet, south 47½ degrees west 172 feet, south 44¾ degrees west 443 feet, south 29¾ degrees west 183 feet [40] south 43½ degrees west 618 feet, south 49¾ degrees west 287 feet, south 44¼ degrees west 345 feet, south 29¼ degrees west 447 feet, south 10¾ degrees west 69 feet, east 611 feet, north 36½ degrees east 1754 feet, and north 548 feet to the point of beginning, being the same land in the northeast quarter of said section 23 that is now enclosed in the fence of Ellen Ruff; also 149.95 acres in the southwest quarter of the southwest quarter, the east half of the southwest quarter, the southeast quarter of the northwest quarter, and the west half of the southeast quarter of section 13, township 43 north, range 8 west, Mount Diablo Meridian, California, bounded as follows: Beginning at a point from which the corner of sections 13, 14, 23 and 24 bears west 580 feet; running thence east 1311 feet, north 52½ degrees east 864 feet, north 43½ degrees east 80 feet, north 71½ degrees east 226 feet, north 58¼ degrees east 108 feet, north 68¾ degrees east 118 feet, east 205 feet, north 63½ degrees east 69 feet, north 16 degrees east 178 feet, north 1 degree east 163 feet, north 48¼ degrees east 60 feet, north 51 feet, north 27½ degrees east 30 feet, north 5¾ degrees east 101 feet, north 27¾ degrees east 221 feet, north 19¼ degrees east 100 feet, north 43 degrees east 100 feet, north 8¾ degrees east 132 feet,

north 15¾ degrees west 206 feet, north 50¾ degrees west 71 feet, north 83½ degrees west 61 feet, north 42¼ degrees west 184 feet, north 26¼ degrees west 102 feet, north 42¼ degrees west 165 feet, north 66 degrees west 42 feet, north 35½ degrees west 83 feet, north 59¼ degrees west 230 feet, west 285 feet, north 231 feet, north 30¼ degrees west 52 feet, north 15¾ degrees west 796 feet, south 49¾ degrees west 782 feet, south 33 degrees west 336 feet, south 21¾ degrees west 264 feet, south 3 degrees west 13 feet, west 204 feet, south 1320 feet, west 142 feet, south 36¾ degrees west 287 feet, south 33½ degrees west 109 feet, south 21½ degrees west 148 feet, south 37½ degrees west [41] 230 feet, south 49½ degrees west 132 feet, south 34½ degrees west 180 feet, south 3¼ degrees west 196 feet, and south 9¼ degrees east 253 feet to the point of beginning, being the same land now enclosed in the fence of Maggie Wall and George Wall, her husband, except 1.44 acres in the southwest quarter of the northeast quarter and .54 of an acre in the northwest quarter of the southwest quarter of section 13 enclosed in the fence and not included herein, and including herein all of the northeast quarter of the southwest quarter of section 13, a small part of the westerly portion of which is not enclosed by the fence.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the grant to aid in the construction of the railroad aforesaid and the patent issued thereunder by the United States on July 31, 1904, to the defendant Central Pacific Railway

Company were, in so far as the above-described lands are concerned, subject to the right of this Indian occupancy, which can be disturbed or interfered with only by the United States.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants, their agents and servants and all persons claiming by, through or under them, be, and they are hereby enjoined and restrained from interfering with or in any manner disturbing the said Indians in their use, occupation, possession and enjoyment of the above-described lands so long as same may be maintained by them or their heirs or until the United States shall otherwise direct.

Done this 17th day of September, 1920.

(Signed) FRANK S. DIETRICH,
United States District Judge.

[Endorsed]: Filed and entered September 20, 1920. Walter B. Maling, Clerk. [42]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

IN EQUITY—No. 398.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRED W. CRAMER, IRA B. CRAMER, and CENTRAL PACIFIC RAILWAY COMPANY, a Corporation,
Defendants.

Statement of Evidence upon the Issue of Indian Occupancy on Appeal to the Circuit Court of Appeals, Ninth Circuit.

The following testimony as to Indian possession of the land in controversy was offered and received over the objection and exception of defendants upon the grounds:

1. Upon the ground that the grant to defendant's predecessor is a public act of Congress, approved July 25, 1866, and does not except lands occupied by Indians.

2. It is not alleged that the occupants were members of any tribe or band, that the law does not recognize individual rights.

3. That there is no allegation that the Indian possession has been disturbed.

4. Adverse Indian possession is not material, because it does not arise out of Indian pupilage and the United States of America is without essential interest to maintain the action.

5. There is no allegation of Indian ownership, nor of the elements of adverse possession.

6. It appears upon the face of the bill that the Indians [43] are citizens with full right of action in their own names.

Testimony of L. B. Luttrell, Called by Plaintiff.

Direct Examination.

L. B. LUTTRELL testified that he was 78 years old in June, 1920; that he lives in Siskiyou County, California, in township 43 north, range 8 west,

(Testimony of L. B. Luttrell.)

Mount Diablo Meridian, and has lived there ever since the fall or summer of 1859. He knows the Indians Maggie Wall and Ellen Ruff; also George Wall, who is some relative of Ellen Ruff. Maggie Wall is the wife of George Wall. The ranch of the Walls and the ranch of Ellen Ruff adjoin. Wall lives northwest from Ruff.

These Indians live on Moffet Creek, and are the only Indians that are left on this creek. They have lived on the creek where they now live since they were small children, since 1859. There were Indians on Moffet Creek when witness first came to Siskiyou County; they are buried there in the graveyard.

Since 1859 I have lived just over the hill from the Indians and during all that time they have been living right where they live now. Maggie Wall's father and mother lived on the same place when I first went there.

George Wall and Maggie Wall have no children. Mrs. Ruff has four or five boys that are living. Most of them live with her except when they are out at work; they have to go out and work for a living. Witness does not know to what tribe they belong. The Indians in that neighborhood, as near as witness could ever learn, had no chief. There were just little bunches of them. They would have one of them appointed to rule the others. That is the way the Indians told how they did. There was no chief at the head of the Indians around that country.

(Testimony of L. B. Luttrell.)

Cross-examination.

The Indians live right along that creek. There were some Indian houses burned there, and they would make new houses. Ruff built a new house for Ellen Ruff. That was several years ago; [44] they built a new log-house. It was a little ways from the site of the house that had burned.

Maggie Wall has not always lived in the same house since witness has known her. She lived further down a few hundred yards from her present house. She moved into the present house a good many years ago. Maggie Wall and Ellen Ruff did not have any other home; that was always their home.

Testimony of James D. Fairchild, Called by Plaintiff.

Direct Examination.

JAMES D. FAIRCHILD testified that he is 57 years of age, was born and raised in Siskiyou County, where he now resides. He knows the Indians George Wall, Maggie Wall and Ellen Ruff. Maggie Wall and George Wall live in section 23, township 43 north, range 8 west; and Ellen Ruff lived just below there on section 13. Witness was last upon the ground a few days before the trial. His first visit was ten or fifteen years prior thereto. Maggie Wall and Ellen Ruff were reputed to be full blood Indians, and George Wall is reputed to be a half-breed.

(Testimony of James D. Fairchild.)

Witness also knew the father of the Ruff boys. The father came from Moffet.

Witness knows the defendants Ira B. Cramer and Fred W. Cramer. They have a stock ranch on this same creek within a few miles of the land in controversy. The Cramer boys were born and raised in that vicinity. Witness had often seen the Cramer boys and the Ruff boys together.

Cross-examination.

Witness knew of the dwelling-place of the Indians ten or fifteen years ago only by hearsay. His direct knowledge on this point dated back only about four years. The Ellen Ruff residence is near the center of Section 13, a little east of the center, a little south of the dividing line, between the NE. ¼ and the SE. ¼. The house of George and Maggie Wall is in the [45] SW. ¼ of section 23, not very far from the southwest corner.

On redirect examination this witness stated that he desired to correct his testimony as he believed he got the two claims turned around. The Ruff place was further upstream.

Testimony of James W. Reynolds, Called by Plaintiff.

Direct Examination.

JAMES W. REYNOLDS testified that he was eighty years old on April 10, 1920; and that he lives in Fort Jones, Siskiyou County, California. He knows the Indians George Wall, Maggie Wall and Ellen Ruff. Witness first visited Moffet

(Testimony of James W. Reynolds.)

Creek in 1864. Witness was in the packing business, had a band of mules wintered on Moffet Creek. These Indians were scattered over the creek up to what was called Duzel's ranch on the creek. The Indians who were on the creek in 1864 are all dead and gone; the children are grown up and a great many of them are dead and gone. Wall and Mrs. Ruff are offspring of that old tribe which was there.

As the witness recollects it, "a mile square would cover every distance around from where they lived." They may have moved a little. He didn't know whether they have moved; but "they have not moved a mile from where they were when I first came to the country."

Cross-examination.

The house of Ellen Ruff is on Duzel Creek; witness cannot fix its location more precisely. He does not know how long that house has been there. The present house was not there in 1904, and witness has no means of knowing when it was built. "You can take it from where they live now and take it a mile either north, west, east or south, and I think it would cover every movement they have made in the last 25 years."

George and Maggie Wall were not in their present house 15 years ago. Had a kind of a wickiup house when witness was there. It may have been within a quarter of a mile of the present house, witness could not be certain. [46]

Testimony of Peter H. Luttrell, Called by Plaintiff.

Direct Examination.

PETER H. LUTTRELL testified that he came to the vicinity of the land in controversy in June, 1859, and has lived in that general vicinity since that time. He knew Ellen Ruff since 1859. She was then but five years old. Her father, Captain Jack, was killed in 1858, and was buried on the place, later taken up by the father of the witness. Ellen Ruff then lived on Moffet Creek. The Indians lived in wickiups built of bark and dirt. In 1866 they had a wickiup, and whenever they went off on a hunt, or to a new place, they would burn these wickiups before they left. People could never account for this practice, but they would build others. Now they have wickiups made of planks and logs, but in these early days they had nothing but bark and dirt over it. On abandoning a wickiup it would probably be 100 yards or 200 yards to where they built at some other place. It didn't take much to build the wickiups. Witness in looking after his livestock would drive through there and ask the Indians concerning the stock. The Indians were then within a quarter or a half of a mile of the same place. The wickiup of Captain Jack, Ellen Ruff's father, was pointed out to witness in 1859, and is now on the same place where Ellen now lives. She was then five or six years old.

Cross-examination.

Witness said he first saw the wickiups in 1860,

(Testimony of Peter H. Luttrell.)

but in 1859 he saw the Indians coming out of that place where the Indians were buried. There was an Indian burial ground on this land, but the last Indian burial there was in 1859. There were no Indians buried on the place of Maggie Wall or Ellen Ruff but there were burials further up the creek. The Indians would move their wickiups and villages up and down the creek within a half or three-quarters of a mile; they moved back and forth. Witness does not know how long Ellen Ruff has lived in her present house. [47]

He does not know where the corners of Sections 13 or 23 are located, nor upon what section or sections these Indians are living. He does know the creek they were on. It was called Duzel Creek, but in the early days it was known as the south fork of Moffet Creek. A man by the name of Duzel located there, and they named the creek for him afterwards.

Witness does not know how long Maggie Wall has occupied the present residence. Her father had his wickiup a little ways below there, across the creek. Afterwards he moved his improvements and wickiup up onto the same side that George Wall was. Whenever they wanted to move in those days they simply picked up their outfit and moved, but in later years they commenced to settle. It was about 1870 they commenced to settle close together, because they were given warning they would lose all their claims, and would have no homes, but the old timers are all dead. Maggie Wall's father used to live across the

(Testimony of Peter H. Luttrell.)

creek on the land now owned by the defendants Cramer. That is not the land involved in this action, but a ranch in the vicinity claimed by the Cramers.

There was a bunch of Indians there up and down the creek. Then a brother of the witness in 1870 got an appropriation for those Indians and bought them a number of horses and wagons, harness and belongings and told them to fix up little places and go to work and raise vegetables. He staked out a country for them on Moffet Creek. The place thus staked out would take in the Cramer claim and Ellen Ruff's place and George Wall's place. It started at a big pine tree. They blazed out a place and told them to stay there. That was at the time of the Modoc war. It was J. K. Luttrell and Judge Steel who went over and did it. Witness took no part in this removal and concentration of the Indians, and has no knowledge as to the authority for the action taken. [48]

Testimony of William A. Marschalk, Jr., Called by Plaintiff.

WILLIAM A. MARSCHALK, Jr., Chief of the Land Division, Office of Indian Affairs, Department of the Interior, testified, by way of deposition, on behalf of plaintiff, taken on oral interrogatories and cross-interrogatories at Washington, D. C., March 19, 1920. The deposition was offered in evidence by plaintiff. Witness has been employed in the Indian Office since October, 1894, in various capacities,

(Testimony of William A. Marschalk, Jr.)

ranging from clerk to Chief of the Land Division. The action of the Indian Office with relation to the Indians George and Maggie Wall and Ellen Ruff, relating to their occupancy of the lands in controversy, and the negotiations with the defendant Central Pacific Railway Company in that connection were as follows:

On January 6, 1915, the Indian Supervisor at Roseburg, Oregon, having jurisdiction of this region, wrote a letter to the Commissioner of Indian Affairs relative to negotiations between the Indian Supervisor and defendant Central Pacific Railway Company, over the occupancy of George Wall and Maggie Wall of the SE. ¼ of the NW. ¼, NE. ¼ of the SW. ¼, S. ½ of the SW. ¼ and W. ½ of the SE. ¼ of section 13, township 43 north, range 8 west, Mount Diablo Meridian, which letter is in part in the following words:

"I have had considerable correspondence with the Land Department of the Railroad Company in regard to this and various other parcels of land within the land grant, and advised the Railroad Company that if they would draw a lease in this particular case, I would submit same for the consideration of your office.

It appears to me that this lease if executed by the Department as drawn would be very much in favor of the Railroad Company, some particular conditions stipulated therein being arbitrary.

Under all the conditions and in view of the [49] stipulations mentioned I do not feel like recommend-

(Testimony of William A. Marschalk, Jr.)

ing this lease, at any rate not until getting the advice of your office on the matter.

In this connection it will be noted that there was an Act of Congress passed March 4, 1913, authorizing Indians to make application for allotment on railroad land provided they have lived thereon for more than five years. Under the provisions of this Act nine applications have been submitted to the Land Office, none of which have yet been approved. So far as I am advised the most advanced case is that of Ellen Clark, in regard to which I am advised by your letter of Aug. 28, 1914, (Land Allotments, 77245–13; 87762–14 H. M. V.), and according to the information contained in last paragraph of said letter, there is nothing definite about the relinquishment of the tract described by the Indian and acceptance of lieu land therefor.

As I have heretofore advised, there are many Indians living within the primary limits of the Central Pacific land grant, who have occupied said lands for varying periods. This statement has particular reference to Indians in the former Redding land districts, comprising the counties of Tehama, Shasta, Siskiyou and Trinity, in California. I do not know the exact number of such Indians, as they are scattered over a very wide territory.

With reference to the rights of these Indians to receive allotments within the railroad land grant, I have to advise as follows: Original grant was made by the 39th Congress under date of July 25, 1866,

(Testimony of William A. Marschalk, Jr.)

page 240 U. S. Statutes. I quote from Chap. 242, Sec. 2, as follows:

> " 'And when any of said alternate sections or parts of sections shall have been found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of, other lands designated as aforesaid [50] shall be selected by said company in lieu thereof under the direction of the Secretary of the Interior.'

The following is quoted from Decisions relating to the Public Lands, Vol. 39, page 5:

> " 'Where a tract of unsurveyed land within the primary limits of a railroad grant was at date of definite location of road in good faith occupied by a qualified homestead settler, and by conveyance and connected with continuous occupancy the right passed from one settler to another down to date of filing the township plat of survey, the rights of the settler are superior to the claims of the company under its grant.'

and section 2 on the same matter:

> " 'When any of said alternate sections or parts of sections shall have been found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of, other lands designated as aforesaid, shall be selected by the said companies in lieu thereof.'

Will you kindly give this matter your consideration and advise me as to your opinion of the legal

(Testimony of William A. Marschalk, Jr.)

status of the Indians mentioned, and whether or not in view of the above-quoted statutes and decisions any of the foregoing Indians could legally hold the land occupied by them as against the claims of the railroad company? It will of course be necessary to establish definitely the period of occupancy of the Indian."

* * * * * * * * *

To this letter the Commissioner of Indian Affairs replied on March 6, 1915, as follows:

"The Office has no material objections to offer to the form of the lease, and is willing to pay the nominal rental of $12.00 named as consideration in the lease. Five copies should be forwarded for approval, if possible, at least two copies being required for the use of this Office.

With reference to the status of Indians occupying odd numbered sections within the company's grant, the [51] general rule has been that if occupancy by the Indian can be shown to be prior to the filing of the map of definite location it would defeat the right of the railroad company. As you are undoubtedly aware, until the Indian homestead act of March 3, 1875 (18 Stat. L. 420) there was no authority or law whereby an Indian, as such, could acquire a homestead or pre-emption right on the public lands. Since the title to the foregoing described lands inured to the Railroad Company under its grant prior to the date when the provisions of the homestead laws were first extended to the Indian, the status of the Indian occupancy of the above land

(Testimony of William A. Marschalk, Jr.)

is not such as would legally authorize the requesting of a relinquishment from the Railroad Company.

The rights of the railroad company evidently inured under their grant dated July 25, 1866 (13 Stat. L. 239) and while the Act of June 22, 1874 (18 Stat. L. 194) provided for such adjustments as you suggest in the case of 'actual settlers' the Office is not aware that Indian occupants were considered as actual settlers on the public lands until after the passage of the Act of March 3, 1875 (18 Stat. L. 420).

The Act of March 4, 1913 (37 Stat. L. 1007) however, unquestionably protects Indians having the status of those mentioned by you and railroad companies have been requested in a number of cases to relinquish and reconvey to the Government certain specifically described tracts for allotment purposes."

Pursuant to this correspondence the Indian Supervisor on March 13, 1915, transmitted to the Commissioner of Indian Affairs for approval the lease contemplated by the prior correspondence. [52] This proposed lease was on April 3, 1915, transmitted by the Commissioner of Indian Affairs to the Secretary of the Interior, with a letter of recommendation that the lease be approved and executed. In due course the lease was executed and rentals were paid by the United States of America unto defendant Central Pacific Railway Company until June 30, 1916. The substance of the letter is as follows:

> "I have the honor to transmit herewith a lease in quintuplicate, covering 240 acres of land in

(Testimony of William A. Marschalk, Jr.)

Siskiyou County, California, from the Central Pacific Railway Company to the United States, for the benefit of two homeless California Indians, namely, George Wall and Maggie Wall. The consideration named in the lease is $12.00, which covers a period of eight months—November 1, 1914, to June 30, 1915.

George and Maggie Wall are actual occupants of the land in question, and are otherwise unprovided for with lands. After careful consideration, the Office finds no fault with the form of the lease and as the rental of $12.00 is nominal, the Office deems it advisable to enter into this lease, thus making temporary provision for these two Indians.

It is therefore recommended that the lease be approved, and that this Office be authorized to pay the lessor the consideration named in the lease—$12.00—from the fund 'Support of Indians in California.' "

On July 3, 1916, the Indian Supervisor addressed a communication to Commissioner of Indian Affairs, enclosing a proposed lease for the benefit of Mrs. Ellen Ruff, covering her occupancy of the NE. ¼ of the NE. ¼ and S. ½ of the NE. ¼ of Section 23, township 43 north, range 8 west, Mount Diablo Meridian. The letter recites [53] that the conditions governing the Ruff occupancy are essentially the same as in the prior Wall case and recommends approval and execution of the lease for the reserved rental of $10 a month. In turn this proposed lease

was by the Commissioner of Indian Affairs referred on August 1, 1916, to the Secretary of the Interior, recommending approval and execution of the lease, and payment of the reserved rental from fund for the "Support of Indians in California 1917." This lease also was later executed and the rental was paid by the United States of America to and including June 30, 1916. The only information that the Indian office had of the matter was contained in the foregoing letter from the Supervisor, and the office in acting upon the leases relied on this information. At the time of execution of the leases witness, who acted as the Indian officer in the matter, did not know that the occupation of the Indians antedated the time when the grant to the railroad company took effect.

Motion to Dismiss for Failure of Proof.

Upon the close of plaintiff's evidence defendants moved to dismiss for failure of proof:

1. That the treaty set out in the complaint was pending at the date of the grant to defendant's predecessor (July 25, 1866).

2. That the treaty was pending at the date of the definite location of defendant's railroad (August 7, 1871).

3. That the land is within the boundaries of the proposed Indian reservation.

4. That the land was not reserved at or since the date of patent or otherwise conditioned so as to toll the statute of limitations.

5. That the land was occupied by the Indians at the date of the grant.

6. That the land was occupied by the Indians at the date of definite location of the road.

7. That there was any tribal or communal occupancy at any time.

8. That the Indians named were members of any tribe or band.

9. That the Indians assert any claim by virtue of their pupilage. [54]

10. That the Indian claim, if any, was presented to the Commissioner as required by Act of March 3, 1851, sections 8 and 13.

11. That the plaintiff has any interest essential to maintain the suit.

12. That the Indian title (possession) if any, has been disturbed by the defendants.

13. That there was any official survey in the early period of Indian occupancy, if any, to authorize defendants or predecessors to maintain ejectment.

14. That there was any payment of taxes by the Indians.

15. That the Indian claim, if any, was adverse to the railroad company's title.

The motion was denied, and defendants reserved an exception upon the grounds stated in the motion.

The case was tried and submitted on August 24, 1920. On September 4, 1920, plaintiff moved in open court for leave to file a second amended complaint, to which the defendants objected in open court upon the grounds that the proposed amended complaint tenders new issues beyond the scope of the action, and that the pleading tends to change the

action from one in equity to one the issues of which are essentially legal in their nature; and upon the further ground that the evidence introduced in the case estops the new issue tendered, that is, the issue of wardship of the Indians, and shows that the Indians are citizens in the fullest sense of the term, and are not under any restraint in this case as to the title to these lands; and upon the further ground that the plaintiff owes no duty, retains absolutely no interest in the land, and, therefore, has no interest sufficient to enable it to maintain the action; on the further ground that the right of the plaintiff to waive the failure of the Indians to present their claim under the Act of March 3, 1851, is lost by reason of the intervening grant to defendant. [55]

The objection was overruled, and by leave of Court the second amended complaint was filed, to which the defendants reserved an exception.

The defendants then in open court moved for the dismissal of the action upon the ground that the second amended bill states no cause; upon the second ground that under the amended form it appears on the face of the bill that the plaintiff has no capacity to maintain the action; and upon the third ground that under the amended form the Court has no jurisdiction of the bill.

The motion was thereupon denied, and the defendants reserved an exception, whereupon the following proceedings were had:

"Mr. THUNEN.—I now ask if the defense will be required to answer the new issue, or whether that will be deemed to be denied?

The COURT.—It will be deemed to be denied.

Mr. THUNEN.—Very well, your Honor. We ask leave, then, to prove, and we offer to prove, that these Indians, by their own statements—and we have the certified copies of the answers filed by them in suits in the Superior Court of Siskiyou County involving these same lands, being a possessory action,—the statement of these Indians, and their verified answers, to the effect that they settled on these lands only as early as 1873, that they disclaim any relation of wardship to the Government, they repudiate the authority of the United States to enter into the leases introduced in evidence in this case.

We offer to prove, further, that these Indians have been taxed by the local state authorities and county authorities, and that during the period of indigency they received aid from the local county authorities, and that the United States has never exercised any authority as a guardian in any sense. Of course, it will require some time to prepare that proof, your Honor, except such as is stated in the [56] answers filed by these Indians in these cases, certified copies of which I have. I can produce those. As to the other matters, I would have to resort to other testimony, and it will take a little time to do that.

The COURT.—Mr. Williams, do you admit these facts?

Mr. WILLIAMS.—I admit them, but I claim that they are immaterial. If your Honor will permit me, I would like to file a brief memorandum to show that the proof already offered is sufficient to support the amended bill.

The COURT.—But counsel offers this proof in rebuttal. To facilitate the disposition of the cases, can you not admit that these facts are correct, subject to your objection that they are immaterial or irrelevant?

Mr. WILLIAMS.—Yes, your Honor.

The COURT.—The objection will be sustained in so far as it relates to your suggested proof that they in this pleading claimed to have occupied the land or owned the land only since 1873; that question was in issue originally, and if you had any proof on that it was your duty to offer it at that time. That does not relate to the new issue presented by the amendment.

Mr. THUNEN.—I would then ask leave of the Court to reopen the defense for the purpose of introducing that proof. The proof was a little vague as to these other witnesses, as to just when the Indians had settled on this particular land, the proof being that they had gone up and down the stream. I do not consider the evidence really material from my own viewpoint of the law. I think the evidence was not admissible in the first place.

The COURT.—The application to reopen the case for that purpose is denied upon the statement of counsel.

Mr. THUNEN.—We ask an exception be reserved." [57]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

IN EQUITY—No. 398.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRED W. CRAMER, IRA B. CRAMER and CENTRAL PACIFIC RAILWAY COMPANY, a Corporation,

Defendants.

Stipulation.

It is hereby stipulated that the plat next attached exhibits the location of improvements of the Indians, Maggie Wall and Ellen Ruff, where they now live on section 13 and 23, township 43 north, range 8 west, Mount Diablo Meridian, and that the foregoing statement is a full and correct statement of all of the evidence adduced and proceedings had at the trial of the above-entitled case.

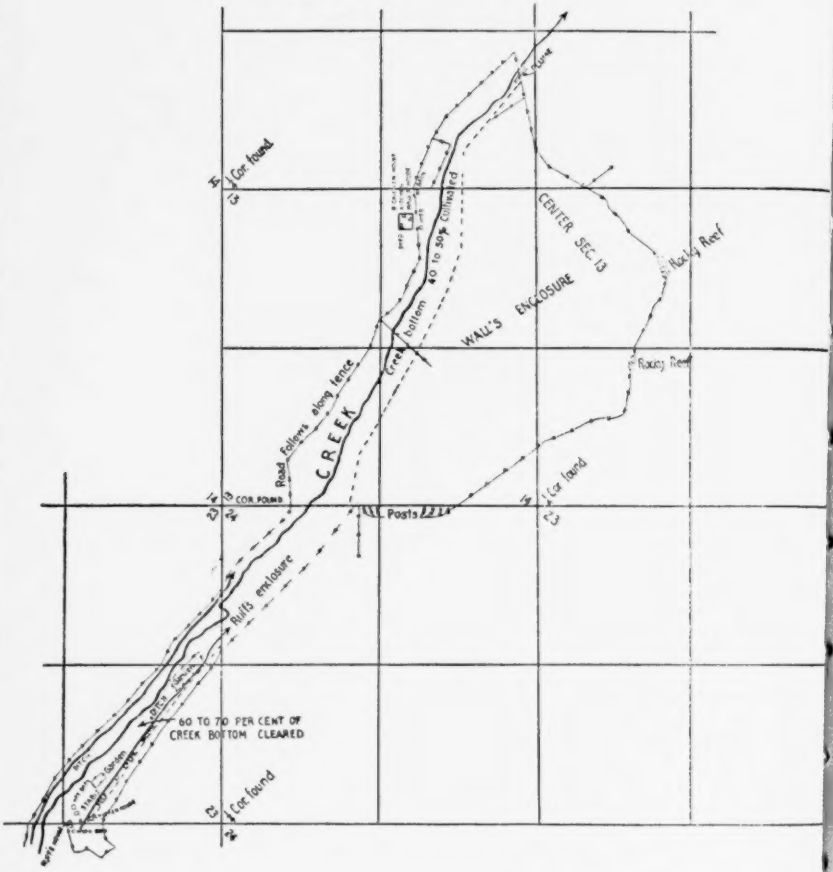
Dated ———.

S. W. WILLIAMS,
Attorney for Plaintiff.
FRANK THUNEN and
W. M. SINGER,
Attorneys for Defendants.

The foregoing statement of fact is hereby settled, allowed and approved this 21st day of Feb. 1921.

W. H. HUNT,
United States District Judge. [58]

Map Showing Improvements on Secs. 13 & 23, T. 43 N., R. 8 W., M. D. M.



[Endorsed]: Filed Feb. 21, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [60]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 398.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRED W. CRAMER, IRA B. CRAMER, and CENTRAL PACIFIC RAILWAY COMPANY, a Corporation,

Defendants.

Petition for Appeal.

To the Circuit Court of Appeals, Ninth Circuit, and to Hon. WILLIAM C. VAN FLEET, District Judge of the Court Above Entitled:

The defendants above named, feeling themselves aggrieved by the decree made and entered in this cause on the 17th day of September, 1920, do hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith; and defendants pray that this appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Cir-

cuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California.

And your petitioners further pray that the proper order touching the security to be required of them to perfect their appeal be made.

Dated February 3, 1921.

FRANK THUNEN,

Attorney for Defendants and Appellants. [61]

Petition granted and the appeal allowed upon giving bond conditioned as required by law in the sum of $250.00 *dollars.*

Dated: Feb. 3, 1921.

WM. H. HUNT,

District Judge.

[Endorsed]: Filed Feb. 3, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [62]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 398.

UNITED STATES of AMERICA,

Plaintiff,

vs.

FRED W. CRAMER, IRA B. CRAMER, and CENTRAL PACIFIC RAILWAY COMPANY, a Corporation,

Defendants.

Assignment of Errors.

Defendants above mentioned, by their solicitor, Frank Thunen, say that the decree entered herein on the 17th day of September, 1920, is erroneous and unjust to the defendants for the reasons given in the following designation and assignment of errors, that is to say, the court erred:

ON PRELIMINARY MOTION TO DISMISS.

I.

In denying the motion of defendants to dismiss the bill of complaint upon the grounds:

(a). That the amended bill of complaint does not set forth facts sufficient to constitute a cause of action in equity, or otherwise, against the defendants, or at all.

(b) That the amended bill of complaint does not set forth any matter or equity, or any fact, entitling the Indians therein named, to wit, Maggie Wall, Ellen Ruff, or the half-breed, George Wall, or any of said named persons, or any other person to the [63] relief therein prayed, or to any relief whatsoever.

(c) That the alleged ground of failure of defendants' title to the lands described in the amended bill of complaint is expressly and solely based upon the misconstruction and misstatement in said amended bill of complaint of a public statute of the Congress of the United States, to wit, an Act entitled "an Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland,

in Oregon," approved July 25th, 1866 (14 Stat. L. p. 239), and that a correct statement of said statute would defeat said cause on the face of said amended bill of complaint.

(d) That there is no allegation in said amended bill of complaint of any title in any Indian, or any group, or band, or tribe, of Indians, or in any person other than defendant Central Pacific Railway Company, and there is no fact alleged to support the conclusion of law expressed in said amended bill that the patent from the United States of America unto Central Pacific Railway Company embracing the lands described in said amended bill of complaint was issued without authority of law.

(e) That it appears upon the face of said amended bill of complaint that any cause attempted to be set up is barred by the first section of the Act of Congress approved March 2, 1896, entitled "An Act to provide for the extension of time within which suits may be brought to vacate and annul land patents, and for other purposes."

(f) That it appears upon the face of said amended bill of complaint that any cause attempted to be set up is barred by the provisions of the Act of Congress, approved March 3, 1891, Vol. 26, of United States Statutes at Large, page 1093.

(g) That the said cause is barred by the long delay, neglect and laches of the plaintiff. [64]

ON MOTION TO MAKE MORE DEFINITE AND CERTAIN.

II.

In denying the motion of defendants to require

plaintiff to make a more particular statement of the ground upon which the patent to Central Pacific Railway Company, dated July 21, 1904, should be canceled, said motion urging the ground of uncertainty and ambiguity in this, that it is averred as a conclusion that at the time the title of the defendants' predecessor would have attached to the lands described in the amended bill of complaint said lands were reserved and appropriated for, and subject to the claims and rights of certain Indians; but it cannot be ascertained whether such claims and rights and such voidability of patent are based upon the alleged occupation by Maggie Wall, Ellen Ruff and George Wall, or upon the alleged inclusion of the said lands within the boundaries of an alleged Indian Reservation under the alleged proposed treaty between certain bands or tribes of Indians and the United States of America.

ON ADMISSION OF EVIDENCE UNDER FIRST AMENDED COMPLAINT.

III.

In admitting any evidence whatsoever as to Indian possession over the objection of defendants, that:

(a) The granting act of July 25, 1866, does not accept lands occupied by Indians.

(b) No individual Indian claim prior to attachment of defendant's grant was recognized by the law as conferring any right.

(c) There is no allegation that the Indian possession has been disturbed. [65]

(d) There is no allegation that the Indian pos-

session arose out of Indian pupilage; and the United States of America is without essential interest to sue upon any other Indian claim.

(e) There is no allegation of Indian ownership, or of the elements of adverse possession.

(f) The Indians are citizens with full right to sue in their own names, and the United States of America is without any interest to support the action.

ON DENIAL OF DEFENDANTS' MOTION TO DISMISS, IN THE NATURE OF A MOTION FOR NONSUIT AT LAW.

IV.

In denying defendants' motion to dismiss the amended bill of complaint for failure of proof:

(a) That there was a treaty pending between the United States of America and the Upper Klamath, Shasta and Scott's River tribes of Indians at the date of the grant to defendants' predecessor, or at any time thereafter.

(b) That the land is within the boundaries of the reserve contemplated by the proposed treaty above mentioned.

(c) That the land in suit was reserved or otherwise conditioned at or since the date of the grant to defendants' predecessor so as to toll the statute of limitations.

(d) That the land was occupied by Indians at the date of the grant to defendants' predecessor.

(e) That the land was occupied by Indians at the date of definite location of the railroad opposite said land.

(f) That the Indians named in the amended bill of complaint were members of any tribe or band.

(g) That the Indians named assert any claim by virtue of their pupilage or wardship. [66]

(h) That the Indian claim, if any, was presented to the Commission for the settlement of private land claims in California pursuant to the Act of March 3, 1851.

(i) That the United States of America has any interest in the subject matter essential to maintain the action.

(j) That the United States of America owes any obligation to the Indians named which would entitle plaintiff to maintain the action.

(k) That the Indian title (possession), if any, has been disturbed by defendants.

(l) That the Indians named assert any claim adverse to the defendants.

(m) That the Indians have ever paid any taxes levied or assessed against the land or that there was any official survey of the land in controversy prior to the lease from defendant to plaintiff, to identify the land as odd sections falling within the terms of the grant to the defendants' predecessor and enabling defendants to maintain ejectment against the Indians.

ON PLAINTIFF'S MOTION TO FILE SECOND AMENDED COMPLAINT.

V.

In allowing plaintiff to file a second amended complaint over defendants' objection:

(a) That the pleading changes the issues and

transforms the cause of action from one in equity to set aside and vacate a patent for mistake of the officers of plaintiff in issuing it, and giving rise to an action at law essentially possessory in its nature.

(b) That plaintiff is estopped from asserting the new issue of Indian wardship by its own evidence that the Indians named are not wards, but enjoy full citizenship, with the right [67] of action in their own names, and assert no claim as to this land through the plaintiff as their guardian.

(c) That the evidence shows plaintiff owes no duty to the Indians as to this land, and that plaintiff has no interest in the subject matter.

(d) That the evidence shows United States of America has lost its right to waive the failure of the Indians to present their claim under the Act of March 3d, 1851, by reason of the intervening grant to defendants' predecessor.

(e) That the evidence fails to show any Indian claim which could have been perfected under the law pursuant to the aforesaid Act of March 3d, 1851, or otherwise.

UPON MOTION TO DISMISS THE CAUSE AFTER SECOND AMENDED COMPLAINT FILED.

VI.

In denying defendants' motion to dismiss the action after the filing of the second amended complaint upon the grounds:

(a) That the second amended bill of complaint fails to state a cause of action.

(b) That in the amended form the pleading dis-

closes on its face that plaintiff has no capacity to sue.

(c) That in the amended form the pleading discloses upon its face that the Court has no jurisdiction to entertain the cause.

UPON RULINGS AS TO EVIDENCE UNDER THE NEW ISSUES TENDERED BY THE SECOND AMENDED BILL OF COMPLAINT.

VII.

In sustaining the objection to defendants' offer to [68] prove the admission of the Indians that their possession of the tracts now enclosed by them dated only from 1873, subsequent to the definite location of the railroad.

VIII.

In denying defendants' motion to reopen the case for the purpose of making the proof suggested in the seventh assignment herein.

FINDINGS OF THE TRIAL COURT.

IX.

In finding that the Indians named, or any Indians, resided on the land described in the pleading since 1859, or at any time prior to the grant to defendants' predecessor.

X.

In finding that the Indians named, or any Indians, resided on the land in question prior to the definite location of the railroad opposite the land in question.

XI.

In finding that the Indians named, or any In-

dians, resided on the land in question prior to the commencement of the action.

XII.

In finding that for over forty years after definite location of the railroad, or for ten years after the patent to defendants' predecessor the Railway Company did not question the Indian right of occupancy. [69]

XIII.

In finding that the office of Indian Affairs or the Department of the Interior did not investigate the Indian rights or claims prior to the acceptance by plaintiff of Central Pacific Railway Company's leases for the benefit of the Indian occupants named in the amended bill.

CONCLUSIONS OF LAW AND DECREE.

XIV.

In concluding that the present Indian possession gives rise to a presumption of title as against the patent to defendant Central Pacific Railway Company, dated July 21, 1904.

XV.

In concluding that Indian occupancy comes within the meaning of the terms of the grant of July 25, 1866: "Reserved or otherwise disposed of."

XVI.

In concluding that the title of Central Pacific Railway Company under its patent of July 21, 1904, is subject to the Indian right of occupancy, terminable only by the United States of America.

XVII.

In concluding that the plaintiff is not estopped to

deny Central Pacific Railway Company's title by reason of the leases from Central Pacific Railway Company to the United States of America, under which the Indians have been suffered to remain in possession. [70]

XVIII.

In concluding that the Indian claim by occupancy, if any, was not lost by failure to assert it as required by the Act of March 3d, 1851 (9 Stat. 631).

XIX.

In concluding that the Indians could acquire any right of possession, except such possession antedate the Mexican session to the United States of America by the treaty of Guadalupe Hidalgo.

XX.

In concluding that the United States of America has capacity to maintain this action.

XXI.

In concluding that the Court has jurisdiction to entertain the action.

XXII.

In concluding that the personal status of the Indians is not in itself sufficient to deprive the United States of capacity to sue and to deprive the Court of jurisdiction to entertain the action.

XXIII.

In concluding that the United States of America owes any obligation to the Indian occupants as to the land in question.

XXIV.

In concluding and decreeing any right of the In-

dian occupants to remain in possession until otherwise directed by the United States of America. [71]

XXV.

In concluding and decreeing that lands other than the areas enclosed be subjected in said decree to the right of Indian occupancy.

XXVI.

In concluding and decreeing that an injunction issue against interference by defendants with possession of the Indians as to the lands described in the decree.

XXVII.

In granting plaintiff any relief whatsoever.

XXVIII.

In failing to find and decree upon the merits in favor of defendants and as prayed in their joint answer.

XXIX.

Other errors appearing upon the face of the record herein.

Dated February 3, 1921.

FRANK THUNEN,
Attorney for Appellant.

[Endorsed]: Filed Feb. 3. 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [72]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 398.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRED W. CRAMER, IRA B. CRAMER and CENTRAL PACIFIC RAILWAY COMPANY, a Corporation,

Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, Fred W. Cramer, Ira B. Cramer and Central Pacific Railway Company, as principals, and United States Fidelity and Guaranty Company, as surety, acknowledge ourselves to be jointly indebted to the United States of America, appellee in the above cause, in the sum of Two Hundred and Fifty (250.00) Dollars, conditioned that, whereas, on the 17th day of September, 1920, in the Southern Division of the United States District Court, for the Northern District of California, Second Division, in a suit pending in that court, wherein United States of America was plaintiff and Fred W. Cramer, Ira B. Cramer, and Central Pacific Railway Company, a corporation, were defendants, numbered on the equity docket 398, a decree was rendered against the said defendants, and the said defendants hav-

ing obtained an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, and filed a copy thereof in the office of the clerk of the court to reverse the said decree;

Now, if the said Fred W. Cramer, Ira B. Cramer and [73] Central Pacific Railway Company shall prosecute their said appeal to effect and answer all damages and costs if they fail to make good their appeal, then the above obligation to be void, else to remain in full force and virtue.

In witness whereof said parties have caused these presents to be executed this 4th day of February, 1921.

CENTRAL PACIFIC RAILWAY COMPANY,

[Seal] By PAUL SHOUP,
Vice-President,
By G. L. KING,
Secretary,
Principals.

UNITED STATES FIDELITY AND GUARANTY COMPANY,

[Seal] By JAMES M. KENNEDY,
By ERNEST W. SWINGLEY,
Attorneys in Fact,
Surety.

Premium charged for this bond is $50 for the term of two years.

Approved Feb. 21, 1921.

W. H. HUNT,
District Judge.

[Endorsed]: Filed Feb. 21, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [74]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 398.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRED W. CRAMER, IRA B. CRAMER and CENTRAL PACIFIC RAILWAY COMPANY, a Corporation,

Defendants.

Praecipe for Transcript on Appeal.

To the Above-entitled Court and to the Clerk Thereof:

On behalf of the above-mentioned defendants and appellants Fred W. Cramer, Ira B. Cramer and Central Pacific Railway Company, I request that you cause to be prepared the transcript of record on appeal in the above-entitled cause, and I hereby designate the following to be included in said transcript:

1. Amended bill of complaint, with the exhibit thereto annexed and made a part of said amended bill.

2. Motion to dismiss the bill of complaint.

3. Stipulation that motion to dismiss bill of complaint apply to first amended bill of complaint.

4. Motion to make first amended bill of complaint more [75] definite and certain.

5. Order denying motion to dismiss first amended bill of complaint.

6. Order denying motion to make first amended bill of complaint more definite and certain.

7. Answer to first amended bill of complaint, as amended at the trial of said cause, by striking therefrom lines 27–32, page 3 of said answer and by interlining between the words "been" and "definitely" on line 8, page 4, the words "expressly rejected by the United States Senate and".

8. Statement of the evidence upon the issue of Indian occupancy, with the stipulation of counsel as to its correctness, and the order of the Court settling and allowing said statement, also including the plat incorporated in said statement.

9. Second amended bill of complaint.

10. Opinion of the Court.

11. Decree dated September 17, 1920.

12. Petition for appeal, with order for its allowance endorsed thereon.

13. Assignment of errors.

14. Bond on appeal, with approval by the Court endorsed. [76]

15. Citation on appeal.

16. Praecipe.

Dated Feby. 23, 1921.

FRANK THUNEN,
Attorney for Appellants.

Service of the within praecipe is admitted this 24th day of February, 1921.

S. W. WILLIAMS,
By E. B. LACY,
Attorney for Plaintiff.

[Endorsed]: Filed Feb. 24, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [77]

(Title of Court and Cause.)

Petition for Cross-appeal by Plaintiff.

The above-named plaintiff, the United States of America, feeling itself aggrieved by the decree made and entered in this cause on or about September 20, 1920, does hereby pray that a cross-appeal may be allowed from said decree to the United States Circuit Court for the Ninth Circuit, for the reasons specifically set forth in the assignment of errors which is filed herewith.

S. W. WILLIAMS,
Special Assistant to the Attorney General,
Solicitor for Plaintiff and Cross-appellant.

Service of the above petition is hereby acknowledged this 24th day of Feby., 1921, for and on behalf of the defendants and cross-appellees.

FRANK THUNEN,
Solicitor for Defendants and Cross-appellees.

[Endorsed]: Filed Feb. 26, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [78]

(Title of Court and Cause.)

Assignment of Errors on Cross-appeal by Plaintiff.

Now comes United States of America, the plaintiff and cross-appellant in the above-entitled cause, and in connection with its petition for a cross-appeal from the decree lately entered in said cause by this Court, files this its assignment of errors upon which it intends to rely in the prosecution of its said cross-appeal:

I.

The District Court erred in not cancelling the patent that was issued to the defendant railway company in so far as it included any of the following described lands, to wit: The southwest quarter (SW. ¼), the southeast quarter of the northwest quarter (SE. ¼ NW. ¼), the southwest quarter of the northeast quarter (SW. ¼ NE. ¼), and the west half of the southeast quarter (W. ½ SE. ¼) of section thirteen (13), and the northeast quarter (NE. ¼) of section twenty-three (23), township forty-three (43) north, range eight (8) west, M. D. M.

II.

The Court erred in not protecting the Indians in the possession, occupation, use and enjoyment of the entire area of each legal subdivision in which they had made improvements, and in not enjoining the defendants from interfering in any manner with such possession, occupation, use and enjoyment.

WHEREFORE the plaintiff prays that the decree be modified in accordance herewith, and for such other, further and different relief as it may in equity and good conscience be entitled to.

S. W. WILLIAMS,

Special Assistant to the Attorney General,
Solicitor for the Plaintiff and Cross-appellant.

[79]

Service of the above assignment of errors on cross-appeal by plaintiff is hereby acknowledged this 24th day of February, 1921, for and on behalf of the defendants and cross-appellees.

FRANK THUNEN,

Solicitor for Defendants and Cross-appellees.

[Endorsed]: Filed Feb. 26, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [80]

(Title of Court and Cause.)

Order Allowing Cross-Appeal.

It appearing that the above-named plaintiff has heretofore filed its petition for the allowance of a cross-appeal and concurrently therewith its assignment of errors,—

IT IS HEREBY ORDERED that a cross-appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree in said cause made and entered on September 20, 1920, be and the same is hereby allowed to the said plaintiff.

Dated 24 Feb., 1921.

W. H. HUNT,
Circuit Judge.

Service of the above order allowing cross-appeal is hereby acknowledged this 24th day of February, 1921, for and on behalf of the defendants and cross-appellees.

FRANK THUNEN,
Solicitor for Defendants and Cross-appellees.

[Endorsed]: Filed Feb. 26, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [81]

(Title of Court and Cause.)

Praecipe of Plaintiff, United States of America, for Transcript on Cross-Appeal.

To the Clerk of the Above-entitled Court:

You will please prepare and duly authenticate a transcript of the following portions of the record in the above-entitled cause for the cross-appeal of the said plaintiff heretofore allowed herein to the United States Circuit Court of Appeals for the Ninth Circuit, in accordance with Equity Rule 76, to wit:

1. Petition of plaintiff for allowance of cross-appeal.
2. Assignment of errors upon which the foregoing petition is based.
3. Order allowing cross-appeal.

4. Citation on cross-appeal showing service thereof.

5. This praecipe.

S. W. WILLIAMS,
Special Assistant to the Attorney General,
Solicitor for the Plaintiff and Cross-appellant.

Service of the above praecipe is hereby acknowledged this 24th day of February, 1921, for and on behalf of the defendants and cross-appellees.

FRANK THUNEN,
Solicitor for Defendants and Cross-appellees.

[Endorsed]: Filed Feb. 26, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [82]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 398.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRED W. CRAMER et al.,
Defendants.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing eighty-two (82) pages, numbered from 1 to 82, in-

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clusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipes for transcript of record, as the same remain on file and of record in the above cause in the office of the clerk of said court, and that the same constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $32.90; that said amount was paid by the defendants; and that the original citations issued herein are hereunto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 2d day of March, A. D. 1921.

[Seal] WALTER B. MALING,
Clerk United States District Court, for the Northern District of California. [83]

Citation on Appeal.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to United States of America, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the

Northern District of California, Second Division, wherein Fred W. Cramer, Ira B. Cramer and Central Pacific Railway Company, a corporation, are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM H. HUNT, United States Circuit Judge for the Ninth Judicial Circuit, this 21st day of February, A. D. 1921.

W. H. HUNT,
United States Circuit Judge. [84]

Service of the within Citation is hereby admitted this 24th day of February, 1921.

S. W. WILLIAMS,
By E. B. LACY,
Attorney for Plaintiff.

[Endorsed]: No. 398. United States District Court for the Northern District of California, Second Division. Fred W. Cramer et al., Appellants, vs. United States of America. Citation on Appeal. Filed Feb. 24, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 398.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRED W. CRAMER, IRA B. CRAMER and CENTRAL PACIFIC RAILWAY COMPANY, a Corporation,

Defendants.

Citation on Cross-appeal.

The United States of America,—ss.

To Fred W. Cramer, Ira B. Cramer and Central Pacific Railway Company, a Corporation, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty (30) days from and after the date hereof, pursuant to an order allowing a cross-appeal, of record in the clerk's office of the United States District Court for the Southern Division of the Northern District of California, wherein the United States of America is appellant and Fred W. Cramer, Ira B. Cramer and Central Pacific Railway Company, a corporation, are appellees, to show cause, if any there be, why the decree entered in said cause

on September 20, 1920, as in said order allowing cross-appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable W. H. HUNT, United States Circuit Judge for the Ninth Circuit, this 24th day of February, in the year of our Lord one thousand nine hundred and twenty-one and of the Independence of [85] the United States of America one hundred and forty-fifth.

W. H. HUNT,
Circuit Judge.

Service of the above citation is hereby acknowledged this 24th day of Feby. 1921, for and on behalf of the defendants and cross-appellees.

FRANK THUNEN,
Of Solicitors for Defendants and Cross-Appellees.
[86]

[Endorsed]: No. 398—In Equity. In the District Court of the United States for the Southern Division of the Northern District of California, Second Division. United States of America vs. Fred W. Cramer, Ira B. Cramer and Central Pacific Railway Co. Citation on Cross-Appeal. Filed Feb. 26, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 3657. United States Circuit Court of Appeals for the Ninth Circuit. Fred W. Cramer, Ira B. Cramer and Central Pacific Railway Company, a Corporation, Appellants and Cross-

Appellees, vs. United States of America, Appellee and Cross-Appellant. Transcript of Record. Upon Appeal and Cross-Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed March 4, 1921.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3657.

FRED W. CRAMER, IRA B. CRAMER, and CENTRAL PACIFIC RAILWAY COMPANY, a Corporation, Appellants and Cross-Appellees,

vs.

UNITED STATES OF AMERICA, Appellee and Cross-Appellant.

Upon Appeal and Cross-appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Frank Thunen, Attorney for Appellants, 65 Market Street, San Francisco, California.
S. W. Williams, Special Assistant to the Attorney General, Attorney for the Appellee, Pawhuska, Oklahoma.

At a Stated Term, to wit, the October Term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit Held in the Court-room Thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the Fourth Day of May, in the Year of Our Lord One Thousand Nine Hundred and Nineteen.

Present:

Honorable William B. Gilbert, Senior Circuit Judge Presiding.
Honorable Erskine M. Ross, Circuit Judge.
Honorable William H. Hunt, Circuit Judge.

No. 3657.

FRED W. CRAMER, IRA B. CRAMER, and CENTRAL PACIFIC RAILWAY COMPANY, a Corporation, Appellants and Cross-Appellees,

vs.

THE UNITED STATES OF AMERICA, Appellee and Cross-Appellant.

Order of Submission, etc.

Ordered oral motion of Mr. Frank Thunen, counsel for the appellants and cross-appellees, for continuance of hearing of above cause to May 18, 1921, denied.

Further ordered upon motion of Mr. Frank Thunen, above entitled cause submitted to the Court for consideration and decision on

briefs, with leave to counsel for the respective parties to file additional briefs on or before May 31, 1921.

At a Stated Term, to wit, the October Term, A. D. 1921, of the United States Circuit Court of Appeals for the Ninth Circuit Held in the Court-room Thereof, in the City and County of San Francisco, in the State of California, on Monday, the Tenth Day of October, in the Year of Our Lord One Thousand Nine Hundred and Twenty-one.

Present:

Honorable William B. Gilbert, Senior Circuit Judge Presiding.
Honorable William W. Morrow, Circuit Judge.
Honorable William H. Hunt, Circuit Judge.

In the Matter of the Filing of Certain Opinions and of the Filing and Recording of Certain Decrees.

By direction of the Honorable William B. Gilbert, Erskine M. Ross, and William H. Hunt, Circuit Judges, before whom the causes were heard, ordered that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the clerk, and that a Decree be filed, and recorded in the Minutes of this Court, in each of the causes in accordance with the opinion filed therein:

* * * * * * *

No. 3657.

FRED W. CRAMER, IRA B. CRAMER, and CENTRAL PACIFIC RAILWAY COMPANY, a Corporation, Appellants and Cross-Appellees,

vs.

UNITED STATES OF AMERICA, Appellee and Cross-Appellant.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3657.

FRED W. CRAMER, IRA B. CRAMER, and CENTRAL PACIFIC RAILWAY COMPANY, a Corporation, Appellants and Cross-Appellees,

vs.

UNITED STATES OF AMERICA, Appellee and Cross-Appellant.

Upon Appeal and Cross-appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Before Gilbert, Ross, and Hunt, Circuit Judges.

The United States sues to cancel a patent alleged to have been issued without authority to the Central Pacific Railway Company in

1904. The patent was issued under the Act of Congress approved July 25, 1866, (14 Stat. 239) making a grant of land to California and Oregon Railroad Company to aid in the construction of a railroad from a connection with the Central Pacific Railroad at Roseville, California to the line between Oregon and California.

The Government's position is that for years prior to 1904 and from time immemorial the Indians occupied and claimed the lands and that none of the Indian rights were extinguished by the Act of 1866 hereinbefore cited. The defendants denied occupation and use, pleaded the statute of limitations, and sale by the railroad company to defendants Cramer under executory contracts made in 1916 and 1917, the sales being subject to leases made by the United States for the benefit of the Indians.

The District Court held that from 1859 the Indian occupants have been in possession of certain of the lands; have fenced between 150 and 175 acres thereof and improved the same; that they acquired substantial rights respected by the Government and that such title as the railroad company acquired is subject to the Indian right of occupancy subject only to interference by the United States, and made a decree in favor of the right of the Indian occupants to remain in possession of the lands and only the lands actually enclosed by fence.

The defendants below appealed, and the United States filed a cross appeal.

HUNT, *Judge*, after stating the facts:

This case affects two individual Indians, remnants of a band that since 1859 have lived in a small valley in Siskiyou County, California. The Indians have occupied and cultivated and enclosed certain of the lands involved. May their occupancy and improvement be regarded as constituting a reservation or disposition of the lands?

Section 2 of the grant of public lands to the Railroad Company, predecessor of Central Pacific Railway Company, contained the following language:

"* * * And when any of said alternate sections or parts of sections shall be found to be granted, sold, reserved, occupied by homestead settlers, preempted or otherwise disposed of, other lands designated, as aforesaid, shall be selected in lieu thereof under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers, as aforesaid, nearest to and not more than ten miles beyond the limits of the first named alternate sections." 14 Stat. 239, Act Congress July 25, 1866.

While it is true that prior to the act of March 3, 1875, 18 Stat. 420, extending the homestead privileges to Indians, Congress did not recognize the individual right of an Indian to take a homestead under the homestead law, nevertheless, it has long been the policy of the Interior Department not to disturb the possession and occupancy of Indians who have long resided upon the public lands, and have cultivated and improved the same. Evidence of such a policy

is found in Ma-gee-see v. Johnson, 30 L. D. 125 (1900) where it was held that lands there involved in the possession of Indians were not unappropriated public lands within the meaning of the homestead law; and in Shumacher v. State of Washington, 33 L. D. 454 where an Indian had settled upon land which was surveyed in 1880, while the grant to the state of Washington for school purposes was made by the Act of Congress of February 22, 1889, 25 Stat. 626, the ruling was that inasmuch as at the date of the survey the land was in the possession of an Indian living apart from his tribe and cultivated by the Indian, it was "otherwise disposed of" under authority of Congress within the meaning of that term as employed in the Act making the grant of school lands to the state. Secretary Hitchcock said:

"This Department has uniformly respected the occupancy of Indians upon the public lands living apart from their tribes and has, by circular, directed the register and receiver of the several land offices to peremptorily refuse all entries or filings attemped to be made by others than the Indian occupants upon lands in the possession of Indians who have made improvements of any value whatever thereon (see circular of May 31, 1884, 3 L. D. 371; reissued October 26, 1887, 6 L. D. 341), and has held that such lands are not unappropriated lands within the meaning of section 2289 of the Revised Statutes and are therefore not subject to homestead entry. See Ma-gee-see v. Johnson, (30 L. D. 125)."

To the rulings of the Department the courts will give much weight. U. S. v. Moore, 95 U. S. 760; Hastings & Dakota R. R. Co. v. Whitney, 132 U. S. 357; Midway Co. v. Eaton, 183 U. S. 602. It was held in Buttz v. No. Pac. 119 U. S. 55, there can be no doubt that lands subject to Indian occupancy may be granted to others by Congress; but the language of the act under consideration in that case showed very clearly that Congress intended the grant to become effective as soon as the Indians were removed from the land or as the right of occupancy was terminated. Furthermore, in that case it appeared that the Indians had actually been removed to their respective reservations before the grant to the Northern Pacific Railroad Company was held to be effective. In the present case for years prior to 1866 Indians occupied and improved the lands described in the decree and the United States made no attempt to interfere or to disturb their possession. If the contention of the railroad company is correct, it necessarily leads to the conclusion that Congress meant to take away from the individual Indians homes which they had long possessed and improved and were in possession of when the grant was made; and moreover, that such intention was expressed without making provision for compensation to the Indians. It may be that such a construction is the true one; but in the absence of clear expression or binding authority in support of it, we shall adopt a view more in harmony with the idea repeatedly announced: that the Government meant to protect the Indians in their occupancy and possession. We, therefore, hold that the learned Judge of the District Court was correct in deciding that, although the right of the Indians

was only that of occupancy, nevertheless it was a substantial right respected by the United States and not to be invaded by private individuals without authority of law, and that the lands actually occupied and improved at the time of the grant were reserved and otherwise disposed of subject always to be interfered with or terminated by the United States. Beecher v. Weatherby, 95 U. S. 517; Nadeau v. U. P. R. R. Co., 253 U. S. 442.

It is also argued that the United States lacked the capacity to maintain the action by reason of want of interest; that there was no jurisdiction; and that there was a prior action pending in the state court involving the same issues presented in the present controversy. Capacity to maintain suit by the United States in its own right and as guardian of the Indians was recognized in United States v. Board of County Commissioners of Osage County, 251 U. S. 128; Heckman v. U. S., 224 U. S. 413. We see no merit in the point that the case should have been abated because of the suggestion in the record that there was another case involving possession of the same land pending in a court of the state of California. The litigation in the state court involved the right of possession to the land, whereas the present suit is one to cancel the patent issued to the railroad company, a direct attack upon the patent by a suit which could be instituted and maintained only by the Government itself.

The doctrine of estoppel is inapplicable for granting that the Department of the Interior at one time accepted leases from the railroad company for the lands in question, if we are right in the view that the land was excepted from the grant of the railroad company, or even if the grant was taken subject to the right of Indian occupancy, then the acts of the agents of the Government in taking leases was unauthorized and the Government is not bound by such unauthorized acts.

Nor can the appellant railroad company rely on the statute of limitations. N. P. Ry. Co. v. United States, 227 U. S. 355; United States v. Whited & Wheless, 246 U. S. 552.

By cross appeal, the Government has asked for a cancellation of the patent to the railroad company, and that the decree of the District Court be modified so as to sustain the right of the Indians to the possession of the entire area of each legal subdivision on which they have made any improvements, and that where any part of a 40-acre tract is shown to have been improved and used such improvement and use extends to the entire subdivision. In Quinby v. Conlan, 104 U. S. 420, the Supreme Court said that a settlement upon a portion of the quarter section of the public lands and the making of the improvements thereon as required by law, will sustain a preemption claim to the whole quarter section as against subsequent settlers. It is generally true too that unless the law provides otherwise, public lands are disposed of only according to the legal subdivisions of the public survey and that where there has been a use and occupation of one 40-acre tract, the whole technical quarter section will be excepted from a grant to a railroad company. The Interior Department so ruled in U. P. R. R. Co. v. Simmons, 6 L. D. 172, and in Melder v. White, 28 L. D. 412, 420. Applying the usual rule, Ellen Ruff should be allowed to retain the possession of the east half of

the northeast and the southwest of the northeast quarter of section 23; and Maggie and George Wall shou'd be allowed to retain the possession of the southwest quarter of the southwest quarter and the east half of the southwest quarter, the west half of the southeast quarter and the southeast quarter of the northwest quarter of section 13, because the evidence is that they have improved, used and actually enclosed a considerable part of each of these several subdivisions.

Furthermore, we think it must follow that as the lands were actually occupied and lived upon and improved by the Indians they were not public lands as included within the general land laws of the United States, and hence they did not pass under the grant to the railroad company, which was authorized to take lieu lands.

The decree is reversed and the cause remanded with directions to enter a decree cancelling the patent.

Reversed.

Endorsed: Opinion. Filed Oct. 10, 1921. F. D. Monckton, Clerk, By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3657.

FRED W. CRAMER, IRA B. CRAMER, and CENTRAL PACIFIC RAILWAY COMPANY, a Corporation, Appellants and Cross-Appellees,

vs.

THE UNITED STATES OF AMERICA, Appellee and Cross-Appellant.

Decree.

Appeals from the Southern Division of the District Court of the United States for the Northern District of California, Second Division.

This Cause came on to be heard on the Transcript of the Record from the Southern Division of the District Court of the United States for the Northern District of California, Second Division and was duly submitted.

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court, that the Decree of the said District Court in this cause be, and hereby is reversed, and that this cause be and hereby is remanded to the said District Court with directions to enter a decree cancelling the patent.

[Endorsed:] No. 3657. United States Circuit Court of Appeals for the Ninth Circuit. Fred W. Cramer, et al., vs. United States of America. Decree. Filed and Entered October 10, 1921. F. D. Monckton, Clerk, By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3657.

FRED W. CRAMER, IRA B. CRAMER, and CENTRAL PACIFIC RAILWAY COMPANY, a Corporation, Appellants and Cross-Appellees,

vs.

UNITED STATES OF AMERICA, Appellee and Cross-Appellant.

Petition for Allowance of Appeal.

Fred W. Cramer, Ira B. Cramer and Central Pacific Railway Company, a corporation, appellants (and cross-appellees) in the above entitled case, respectfully petition the above entitled court for the allowance of an appeal of the above entitled case to the United States Supreme Court; and in support of this petition for the allowance of an appeal, these appellants respectfully show:

That on October 10, 1921, this court entered a decree herein against these appellants and in favor of the United States of America, appellee (and cross-appellant) herein, reversing the decree of the United States District Court, Southern Division of the Northern District of California, Second Division, and directing the said court below to enter a decree canceling as to certain lands a patent issued by the United States of America unto appellant Central Pacific Railway Company on July 21, 1904.

In the said decree and orders of this court certain errors were committed to the prejudice of these appellants, all of which will more fully and in detail appear from the assignments of error filed with this petition.

The appellants further show that the decree of this court is subject to review by the Supreme Court of the United States under the provisions of section 241 of the Judicial Code.

It is further shown that this is a suit in equity brought by the United States of America in its own behalf and on behalf of certain individual Indians to set aside the aforesaid land patent issued by the United States of America to Central Pacific Railway Company and necessarily involving a construction of that certain Act of Congress approved July 25, 1866, making a grant of lands unto Central Pacific Railroad Company, predecessor of appellant Central Pacific Railway Company in aid of the construction of that certain line of railroad from the interstate boundary between Oregon and California to a connection with the Central Pacific Railroad at Roseville, California, and herein the jurisdiction of the trial court and the capacity of plaintiff were challenged for want of interest of plaintiff in the subject matter.

It is further shown that the matter in controversy herein exceeds $1,000, besides costs, and that the value of the land occupied, claimed or improved by the Indians mentioned in said bill of complaint, exclusive of costs and exclusive of improvements made or claimed by

said Indians exceeds the sum of $1,000, all of which appears by the record herein and by the affidavit of B. A. McAllaster, hereto annexed, marked Exhibit A and made a part of this petition.

It is further shown that the said decree calls into question the validity of an authority exercised by the Department of the Interior under the United States in the *executive* of the aforesaid land patent unto appellant Central Pacific Railway Company, and calls into question, construes and interprets the terms and provisions of the aforesaid Act of Congress approved July 25, 1866. Said decree further deprives these appellants of their vested property rights in and to the lands described in the proceedings herein and claimed by and under the aforesaid act of Congress and the patent issued pursuant thereto.

Wherefore these appellants pray the allowance of an appeal removing the said cause to the Supreme Court of the United States for the correction of the errors complained of; and that a transcript of record, proceedings and papers in said cause, duly authenticated, may be sent to the Supreme Court of the United States.

And appellants desiring to supersede the mandate of this court upon said decree and the execution thereof, petitioners hereby tender bond in such amount as the court may require for such purpose, and pray that with the allowance of the appeal a supersedeas be issued.

Dated October 28th, 1921.

(Sgd.) FRANK THUNEN,
Attorney for Appellants and Cross-appellees.

EXHIBIT A.

STATE OF CALIFORNIA,
City and County of San Francisco, ss.

B. A. McAllaster, being duly sworn, says:

I am, and for many years last past have been, Land Commissioner for Central Pacific Railway Company, one of the appellants in the above entitled case; that as such Land Commissioner I have been in direct charge of the administration of its land grants, including the grant made by the Act of Congress, approved July 25, 1866; that the lands particularly described in the decree entered in this court in said case on October 10, 1921, have been appraised by and under my direction, and that I am familiar with the value thereof; that Three Thousand Five Hundred (3,500) Dollars is the reasonable market value of the 360 acres particularly described in the decree of this court herein, to wit: SW¼ of the SW¼, E½ of the SW¼, W½ of the SE¼ and SE¼ of the NW¼ of Section 13, E½ of the NE¼ and SW¼ of the NE¼ of Section 23, Township 43 North, Range 8 West, Mount Diablo Meridian.

(Sgd.) B. A. McALLASTER.

Subscribed and sworn to before me this 27th day of October, 1921.

[SEAL.] (Sgd.) FRANK HARVEY,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed:] Petition for Allowance of Appeal to Supreme Court U. S. Filed October 28, 1921. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3657.

FRED W. CRAMER, IRA B. CRAMER, and CENTRAL PACIFIC RAILWAY COMPANY, a Corporation, Appellants and Cross-Appellees,

vs.

UNITED STATES OF AMERICA, Appellee and Cross-Appellant.

Assignments of Error.

Fred W. Cramer, Ira B. Cramer and Central Pacific Railway Company, a Corporation, appellants (and cross-appellees) in the above entitled case, say that in the record and proceedings of the United States Circuit Court of Appeals in and for the Ninth Circuit, — the above entitled cause, and in the entry of the final decree therein, manifest error has intervened to the prejudice of said appellants in this:

1. In failing to direct the court below to enter a decree dismissing the second amended bill of complaint.

2. In resting the said decree upon the policy of the Interior Department not to disturb the possession and occupancy of Indians.

3. In not basing its decision upon the terms of the granting Act of July 25, 1866.

4. In failing to respect the policy of Congress rather than the policy of the Department of the Interior.

5. In holding that it is or has been the policy of the Department of the Interior to regard Indian occupancy or improvement as constituting a reservation or disposition of lands as against the grant to appellants' predecessor made by the Act of Congress approved July 25, 1866, or kindred grants.

6. In holding that the lands in controversy were reserved or otherwise disposed of at the date of said grant, or at the date of definite location of said railroad, or at the date of patent, so as to exclude said lands from the operation of said grant or said patent.

7. In holding that the Indians occupied or improved the lands described in the decree, or any part thereof, for years, or for any time prior to 1866, or prior to the acquisition of title by appellants' predecessor.

8. In failing to find that there was no Indian occupancy or improvement of any part of the lands described in the decree until after

the title of Central Pacific Railroad Company, predecessor of appellants, had attached.

9. In failing to find that full and ample provision for the care of the Indians of California, including the Indians mentioned in said decree, was made by the Act of Congress approved April 8, 1864, and other legislation.

10. In holding that the Government meant to protect the Indians in their occupancy and possession of said lands, or that such meaning ascribed to the grant aforesaid is in harmony with any previous Congressional, departmental or judicial declaration upon the point.

11. In holding and deciding that the occupancy and possession of said Indians was or is a substantial right, or that prior to this action it was ever accepted as such by the United States.

12. In deciding that the United States has capacity to maintain the present action.

13. In holding that the court has jurisdiction to entertain the action.

14. In holding that the United States is not estopped to maintain said action.

15. In holding that the said cause is not barred by the statute of limitations.

16. In extending the Indian claim beyond the limits of the tracts improved and occupied by the Indians.

17. In holding that the lands described in the decree were not public lands within the meaning of the aforesaid grant of July 25, 1866.

18. In applying the provisions of the general land laws of the United States as controlling the aforesaid act of July 25, 1866, as to what lands were included in said special grant.

19. In holding that any provision is made in said special grant for the selection by the railroad company of lands in lieu of lands occupied by Indians.

Dated October 28, 1921.

(Sgd.) FRANK THUNEN,
Attorney for Appellants and Cross-appellees.

[Endorsed:] Assignments of Error on appeal to Supreme Court U. S. Filed October 28, 1921. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3657.

FRED W. CRAMER, IRA B. CRAMER, and CENTRAL PACIFIC RAILWAY COMPANY, a Corporation, Appellants and Cross-Appellees,

vs.

UNITED STATES OF AMERICA, Appellee and Cross-Appellant.

Order Allowing Appeal.

Upon the consideration of the petition for allowance of an appeal from this court to the Supreme Court of the United States in the above entitled cause, it is hereby ordered that said appeal be, and the same is hereby allowed, and the required bond, which shall also act as supersedeas, is fixed at the sum of One Thousand Dollars.

Dated October 28th, 1921.

(Sgd.) WM. B. GILBERT,
Circuit Judge.

[Endorsed:] Order Allowing Appeal to Supreme Court U. S. Filed October 28, 1921. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

S. F. No. 31895-21.

FRED W. CRAMER, IRA B. CRAMER, and CENTRAL PACIFIC RAILWAY COMPANY, a Corporation, Appellants and Cross-Appellees,

vs.

UNITED STATES OF AMERICA, Appellee and Cross-Appellant.

Bond on Appeal.

Know all men by these presents: That we, Fred W. Cramer, Ira B. Cramer and Central Pacific Railway Company, as principals, and United States Fidelity and Guaranty Company, as surety, acknowledge ourselves to be jointly indebted to the United States of America, appellee in the above cause, in the sum of One Thousand (1,000) Dollars, conditioned that, whereas, on the 10th day of October, 1921, in the United States Circuit Court of Appeals, in a suit pending in that court, wherein Fred W. Cramer, Ira B. Cramer and Central Pacific Railway Company were appellants and cross-appellees, and United States of America was appellee and cross-appellant, numbered 3657 in said court, a decree was rendered against the appellants and in favor of appellee, and the said appellants having ob-

tained an appeal to the United States Supreme Court, and filed a copy thereof in the office of the clerk of the court to reverse the said decree; and whereas a supersedeas therein was prayed and granted upon the giving of security as herein provided:

Now, therefore, if the said Fred W. Cramer, Ira B. Cramer and Central Pacific Railway Company shall prosecute their appeal to effect and answer all damages and costs if they fail to make good their appeal, then the above obligation to be void, else to remain in full force and virtue.

In Witness Whereof said parties have caused these presents to be executed this 28th day of October, 1921.

CENTRAL PACIFIC RAILWAY COMPANY,

[SEAL.] (Sgd.) By E. O. McCORMICK,
Vice President,

(Sgd.) By G. S. KING,
Secretary,
Principals.

UNITED STATES FIDELITY AND GUARANTY COMPANY,

[SEAL.] (Sgd.) By HENRY V. D. JOHNS,

(Sgd.) By ERNEST W. SWINGLEY,
Attorneys in Fact,
Surety.

STATE OF CALIFORNIA,
City and County of San Francisco, ss.

On this 28th day of October in the year one thousand nine hundred and 21 before me Muriel Atherton Russell, a Notary Public in and for the City and County of San Francisco, personally appeared Henry V. D. Johns and Ernest W. Swingley known to me to be the persons whose names are subscribed to the within instrument as the Attorneys-in-fact of the United States Fidelity and Guaranty Company, and acknowledged to me that they subscribed the name of the United States Fidelity and Guaranty Company thereto as principal and their own names as Attorneys-in-fact.

[SEAL.] (Sgd.) MURIEL ATHERTON RUSSELL,
Notary Public in and for the City and County of San Francisco, State of California.

The foregoing bond is approved this 29th day of October, 1921.

(Sgd.) WM. H. HUNT,
U. S. Circuit Judge.

[Endorsed:] Bond on Appeal to Supreme Court U. S. Filed October 29, 1921. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3657.

FRED W. CRAMER, IRA B. CRAMER, and CENTRAL PACIFIC RAILWAY COMPANY, a Corporation, Appellants and Cross-Appellees,

vs.

UNITED STATES OF AMERICA, Appellee and Cross-Appellant.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record upon Appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing One Hundred and Seventeen (117) pages, numbered from and including 1 to and including 117, to be a full, true and correct copy of the record under Rule 8 of the Supreme Court of the United States, in the above-entitled cause, including the Assignment of Errors on Appeal to the Supreme Court of the United States and of all proceedings had, and of all papers, including the Opinion filed in the said Circuit Court of Appeals in the above-entitled case, made pursuant to request of counsel for the appellants and cross-appellees, as the originals thereof remain on file and appear of record in my office, and that the same constitutes the transcript of record upon appeal to the Supreme Court of the United States in the above-entitled cause.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 2d day of November, A. D. 1921.

[Seal of United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk.

By PAUL P. O'BRIEN,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3657.

FRED W. CRAMER, IRA B. CRAMER, and CENTRAL PACIFIC RAILWAY COMPANY, a Corporation, Appellants and Cross-Appellees,

vs.

UNITED STATES OF AMERICA, Appellee and Cross-Appellant.

Citation on Appeal.

THE UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, District of Columbia, within sixty days from the date hereof, pursuant to an appeal filed in the Clerk's Office of the United States Circuit Court of Appeals for the Ninth Circuit, in the above entitled case, wherein Fred W. Cramer, Ira B. Cramer and Central Pacific Railway Company, a corporation, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants as in said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Wm. H. Hunt Circuit Judge of the United States Circuit Court of Appeals, for the Ninth Circuit, this 29th day of October, 1921.

WM. H. HUNT,
U. S. Circuit Judge.

[Endorsed:] Docketed. No. 3657. U. S. Circuit Court of Appeals for the Ninth Circuit. Fred W. Cramer, Ira B. Cramer and Central Pacific Railway Company, a Corporation, vs. United States of America. Citation on Appeal. Filed Oct. 31, 1921. F. D. Monckton, Clerk. Frank Thunen, 65 Market St., San Francisco, Attorneys for Appellants.

Service, by copy, of the within citation on appeal is hereby admitted this 31st day of October, 1921.

I. W. WILLIAMS,
Attorney for Appellee and Cross-appellant.

Endorsed on cover: File No. 28,574. U. S. Circuit Court Appeals, 9- Circuit. Term No. 619. Fred W. Cramer, Ira B. Cramer, and Central Pacific Railway Company, appellant, vs. The United States of America. Filed November 15th, 1921. File No. 28,574.

In the Supreme Court

of the

United States

October Term, 1921.

No. 207

FRED W. CRAMER, IRA B. CRAMER, and CENTRAL PACIFIC RAILWAY COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' BRIEF ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FRANK THUNEN,
65 Market St., San Francisco, Cal.,
Attorney for Appellants.

C. F. R. OGILBY,
1416 F Street, N. W.,
Washington, D. C.,
Of Counsel.

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In the Supreme Court

OF THE

United States

October Term, 1921.

No. 619.

FRED W. CRAMER, IRA B. CRAMER, and CENTRAL PACIFIC RAILWAY COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' BRIEF ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

STATEMENT OF THE CASE

This appeal challenges the right of the Government to cancel a patent, issued under a railroad land grant, upon the ground (disputed by appellants) that a portion of each quarter-quarter section affected was occupied by two Indians, Ellen Ruff and Maggie Wall, since 1859, which was prior to the date of the grant. Stating the case more in detail we quote the introductory portion of the opinion of the Circuit Court of Appeals (R., p. 98-99):

"The United States sues to cancel a patent alleged to have been issued without authority to the Central Pacific Railway Company in 1904. The patent was issued under the Act of Congress approved July 25, 1866, (14 Stat. 239) making a grant of land to California and Oregon Railroad Company to aid in the construction of a railroad from a connection with the Central Pacific Railroad at Roseville, California, to the line between Oregon and California.

"The Government's position is that for years prior to 1904 and from time immemorial the Indians occupied and claimed the lands and that none of the Indian rights were extinguished by the Acts of 1866 hereinbefore cited. The defendants denied occupation and use, pleaded the statute of limitations, and sale by the railroad company to defendants Cramer under executory contracts made in 1916 and 1917, the sales being subject to leases made by the United States for the benefit of the Indians.

"The District Court held that from 1859 the Indian occupants have been in possession of certain of the lands; have fenced between 150 and 175 acres thereof and improved the same; that they acquired substantial rights respected by the Government and that such title as the railroad company acquired is subject to the Indian right of occupancy, subject only to interference by the United States, and made a decree in favor of the right of the Indian occupants to remain in possession of the lands and only the lands actually enclosed by fence.

"The defendants below appealed, and the United States filed a cross appeal.

HUNT, Judge, after stating the facts:

"This case affects two individual Indians, remnants of a band that since 1859 have lived in a small valley in Siskiyou County, California. The Indians have occupied and cultivated and enclosed certain of the lands involved. May their occupancy and improvement be regarded as constituting a reservation or disposition of the lands?

"Section 2 of the grant of public lands to the Railroad Company, predecessor of Central Pacific Railway Company, contained the following language:

"'* * * And when any of said alternate sections or parts of sections shall be found to be granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of, other lands designated, as aforesaid, shall be selected in lieu thereof under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers, as aforesaid, nearest to and not more than ten miles beyond the limits of the first named alternate section.' 14 Stat. 239, Act of Congress July 25, 1866."

ISSUES.

The issue at the foundation of the Government's claim is expressed by the learned judge who wrote the opinion in the Circuit Court of Appeals, and quoted above:

(1) *"May their occupancy and improvement be treated as constituting a reservation or disposition of the lands?"* The Circuit Court of Appeals has answered this question in the affirmative, basing its

conclusion upon the assumed policy of the Department of the Interior to look upon Indian claims with favor; although the evidence shows a contrary departmental course of action in this case with a specific ruling against the Indian claim.

(2) In addition to the point that the grant does not except lands occupied by Indians we raise the further issues:

(3) The evidence does not support the finding that this land was occupied by the Indians prior to vestiture of title under the grant.

(4) The Indian claim is strictly individual; no tribal or communal claim is proven or charged, and no recognition was ever given, prior to 1875, to right of individual Indian occupancy.

(5) The Government appeared originally only in its own right, and it was the Government's original contention that the land was within the limits of an Indian reservation made by treaty negotiated in 1851 and *still pending*. But the District Court found that the treaty had been rejected in 1852, and that the lands are not within the limits of the reservation there proposed. This issue is now abandoned by the Government, but collateral to it is another:

(6) Upon the fall of the Government's contention that the land was in an Indian reservation, the Government's interest in the case was defeated. Ellen Ruff and Maggie Wall settled after the land

had become *public domain*. In that day the Indian was strictly in a state of pupilage; his rights were in the reservations. He had no right to settlement on the public domain, and no *right* to remain there, except in the case of tribal occupancy existing prior to the treaty of Guadalupe Hidalgo. There is, then, no right for the Government to protect as guardian, and the Government retains no proprietary interest in the land. Upon this showing the action abated. Defendants should have had a decree, but instead the District Court permitted the Government to file a second amended bill, changing the character in which the plaintiff appeared, and also changing the issue to the end that a decree might be entered declaring the legal title in the defendants with the right of occupancy in the Indians as wards of the Government.

(7) There being neither Indian reservation nor immemorial occupancy, the cause is barred by the statute of limitation; and the title of the appellants Cramer, they being innocent purchasers while the Government held the lands under lease from Central Pacific Railway Company, is confirmed.

(8) The policy of the Department of Interior having been declared to be the basis for the decree, and that department having issued the patent and negotiated the leases from Central Pacific Railway Company to the United States, after full investigation of the Indian question, and the lands having been sold to innocent purchasers for value while this

relation of landlord and tenant existed and expressly subject to the leases, an estoppel will operate.

SPECIFICATION OF ERRORS.

Appellants contend that the decree of the Circuit Court of Appeals is erroneous in the following particulars (R., pp. 105-106):

"1. In failing to direct the court below to enter a decree dismissing the second amended bill of complaint.

"2. In resting the said decree upon the policy of the Interior Department not to disturb the possession and occupancy of Indians.

"3. In not basing its decision upon the terms of the granting Act of July 25, 1866.

"4. In failing to respect the policy of Congress rather than the policy of the Department of the Interior.

"5. In holding that it is or has been the policy of the Department of the Interior to regard Indian occupancy or improvement as constituting a reservation or disposition of lands as against the grant to appellants' predecessor made by the Act of Congress approved July 25, 1866, or kindred grants.

"6. In holding that the lands in controversy were reserved or otherwise disposed of at the date of said grant, or at the date of definite location of said railroad, or at the date of patent, so as to exclude said lands from the operation of said grant or said patent.

"7. In holding that the Indians occupied or improved the lands described in the decree, or

any part thereof, for years, or for any time prior to 1866, or prior to the acquisition of title by appellants' predecessor.

"8. In failing to find that there was no Indian occupancy or improvement of any part of the lands described in the decree until after the title of Central Pacific Railroad Company, predecessor of appellants, had attached.

"9. In failing to find that full and ample provision for the care of the Indians of California, including the Indians mentioned in said decree, was made by the Act of Congress approved April 8, 1864, and other legislation.

"10. In holding that the Government meant to protect the Indians in their occupancy and possession of said lands, or that such meaning ascribed to the grant aforesaid is in harmony with any previous Congressional, departmental or judicial declaration upon the point.

"11. In holding and deciding that the occupancy and possession of said Indians was or is a substantial right, or that prior to this action it was ever accepted as such by the United States.

"12. In deciding that the United States has capacity to maintain the present action.

"13. In holding that the court has jurisdiction to entertain the action.

"14. In holding that the United States is not estopped to maintain said action.

"15. In holding that the said cause is not barred by the statute of limitations.

"16. In extending the Indian claim beyond the limits of the tracts improved and occupied by the Indians.

"17. In holding that the lands described in the decree were not public lands within the meaning of the aforesaid grant of July 25, 1866.

"18. In applying the provisions of the general land laws of the United States as controlling the aforesaid act of July 25, 1866, as to what lands were included in said special grant.

"19. In holding that any provision is made in said special grant for the selection by the railroad company of lands in lieu of lands occupied by Indians."

TOPICAL DIGEST OF ARGUMENT.

I.

The decree claims support in the policy of the Department of Interior, but there is no precedent in the Department of Interior; nor could such policy override the contrary intent declared by Congress and heretofore concretely applied by the Supreme Court.

Authorities:

Buttz vs. *Northern Pacific Rd.*, 119 U. S. 55.
Payne, Secretary vs. *Central Pacific Ry. Co.*, 255 U. S. 228.
United States vs. *Northern Pacific Railway Co.*, 256 U. S. 51.

II.

The grant to appellants' predecessor does not except lands occupied by Indians.

Authorities:

Buttz vs. *Northern Pacific Rd.*, 119 U. S. 55.
United States vs. *Fitzgerald*, 15 Pet. 405, 420.

III.

There was never any tribal occupancy of this land, and the law never gave recognition to right of individual Indian occupancy until the Act of March 3, 1875.

Authorities:

Gritts vs. *Fisher,* 224 U. S. 640, 642.
Sizemore vs. *Brady,* 235 U. S. 441, 446-447.
United States vs. *Fitzgerald,* 15 Pet. 405, 420.
19 Op. Atty. Gen. 559.

IV.

Outline history of Indian titles in California from the standpoint of Congressional action and judicial interpretation.

Authorities:

Barker vs. *Harvey,* 181 U. S. 481.
Botiller vs. *Dominguez,* 130 U. S. 238.
Cherokee Nation vs. *Georgia,* 5 Pet. 1.
Johnson vs. *McIntosh,* 8 Wheat. 543, 574.
III Kent, p. 380.
Thompson vs. *Doaksum,* 68 Cal. 593.
United States vs. *Forty-eight Pounds of Rising Star Tea,* 35 Fed. 403, 405.
Worcester vs. *Georgia,* 6 Pet. 515, 544.

Statutes with reference to California Indians:

March 3, 1851 (9 Stat. 631).
Aug. 30, 1852 (10 Stat. 56).
Mar. 3, 1853 (10 Stat. 238).
July 31, 1854 (10 Stat. 352).

Mar. 3, 1855 (10 Stat. 698, 699).
Feb. 28, 1859 (11 Stat. 400).
June 19, 1860 (12 Stat. 57).
April 8, 1864 (13 Stat. 39).
July 27, 1868 (15 Stat. 198).
Mar. 3, 1871 (Rev. Stat. Sec. 2079).
Mar. 3, 1873 (17 Stat. 633).
Jan. 12, 1891 (26 Stat. 712).
Mar. 1, 1907 (34 Stat. 1022-1023).
Mar. 4, 1913 (37 Stat. 1007).

Debates in Congress reflecting National need and legislative purpose:

Jan. 8, 1851 (Globe Vol. 23, App. p. 61).
Jan. 28, 1851 (Id. p. 362).
Mar. 3, 1851 (Id. p. 777).
Dec. 2, 1851 (President's message), (Globe, Vol. 24, p. 19).
Aug. 30, 1852 (Globe, Vol. 25, p. 1082).
Oct. 31, 1863 (Report Ind. Commr. Senate Doc., 1st. Sess. 38th Cong. 1863-1864, Vol. 3, p. 133).
Mar. 21, 1864 (Globe 1863-1864, Part II, p. 1209).
Sept. 5, 1890 (Report of Commissioner of Indian Affairs 1890, p. XXX).

V.

The evidence is insufficient to support the finding that the Indians occupied the land in controversy prior to the investiture of the fee in appellants' predecessor.

Authorities:

Van Wyck vs. *Knevals*, 106 U. S. 360.

VI.

Upon failure of the Government's allegation that the land was within an Indian reservation, the cause abated for (1) change of cause and parties; (2) incapacity of plaintiff to sue for want of interest; (3) lack of jurisdiction; and (4) because of prior action pending in the State Court involving the changed issue.

Authorities:

Curtner vs. *United States*, 149 U. S. 662, 672.
Dias vs. *Phillips*, 59 Cal. 293.
United States vs. *San Jacinto Tin Co.*, 125 U. S. 273, 285.
United States vs. *Waller*, 243 U. S. 452.

VII.

The cause is barred by the Statute of Limitations.

Authorities:

United States vs. *Chandler-Dunbar Co.*, 209 U. S. 447.

VIII.

The Government is estopped.

Authorities:

Burke vs. *Southern Pacific Railroad Company*, 234 U. S. 669.

Payne, Secretary of the Interior vs. *Central Pacific Railway Co.*, 255 U. S. 228.
Peyton vs. *Smith*, 5 Pet. 483, 491.
State of Iowa vs. *Carr*, 191 Fed. 257.

ARGUMENT.

I.

The decree claims support in the policy of the Department of the Interior, but there is no precedent in the Department of the Interior; nor could such policy override the contrary intent declared by Congress and heretofore concretely applied by the Supreme Court.

The Circuit Court of Appeals has frankly rested its decision upon the *policy of the Department of the Interior*, with little or no regard to the terms of the grant itself, or the interpretations of the Supreme Court. We might go even further and challenge the statement that the policy of the Department of the Interior supports the conclusion of the Circuit Court of Appeals. The Department of the Interior leased these very lands from Central Pacific Railway Company for several years, until, by the commencement of this action, the Department of Justice repudiated the leases. These leases were negotiated with the Government after full investigation and knowledge of the situation. This is disclosed by the deposition of William A. Marschalk, Jr., Chief of the Land Division, Office of Indian Affairs, Department of the Interior. (R., p. 57 et seq.) The Indian supervisor at Roseburg wrote the Washington Office (R., p. 59):

> "As I have heretofore advised, there are many Indians living within the primary limits of the Central Pacific land grant, who have occupied said lands for varying periods. This statement has particular reference to Indians in the former Redding Land district, comprising the counties of Tehama, Shasta, Siskiyou and Trinity, in California."

The reply of the Commissioner of Indian Affairs, dated March 6, 1915, is not entirely consistent, but his conclusion is that the Indian occupancy was of no effect. He says (R., pp. 61-62):

> "As you are undoubtedly aware, until the Indian homestead act of March 3, 1875 (18 Stat. L. 420), there was no authority or law whereby an Indian, as such, could acquire a homestead or pre-emption right on the public lands. Since the title to the foregoing described lands inured to the Railroad Company under its grant prior to the date when the provisions of the homestead laws were first extended to the Indian, the status of the Indian occupancy of the above land is not such as would legally authorize the requesting of a relinquishment from the Railroad Company."

The Secretary of the Interior executed the leases.

Of the two cases in the Department of the Interior cited in the opinion of the Circuit Court of Appeals, the first *Ma-gee-see* vs. *Johnson*, 30 L. D. 125, involves a homestead entry and not a land grant. It is, therefore, not in point. Prior to March 3, 1875, and, indeed, up to March 3rd, 1891, the statute itself expressly forbade homestead entry on land occupied by Indians. The Act of May 20, 1862, permitted homestead entry upon such lands only which at the

time of the application might have been subject to pre-emption. (12 Stat., p. 392.) The pre-emption act authorized entry only upon "lands belonging to the United States, to which the Indian title has been, or may hereafter be extinguished." The homestead law as amended March 3, 1891, permitted entry of "unoccupied public lands", with no specific mention of Indian occupancy; but at that time Indians had the same homestead right as white persons, so that lands claimed by Indian settlers were as much *appropriated* as if they were claimed by white settlers. Moreover, it appears that Johnson had driven the Indian occupant from the land by force in order to make settlement. A homestead claim at best is a mere bounty, which in its incipience might be revoked or repudiated. The railroad land grant, on the contrary, is a contract and not a bounty, and no department of the Government can repudiate it. (*Payne* vs. *Central Pacific Ry. Co.*, 255 U. S. 228; *United States* vs. *Northern Pacific Ry. Co.*, 256 U. S. 51.) In the second case, *Schumacher* vs. *State of Washington*, 33 L. D. 454, the state claimed under its school land grant approved February 22, 1889. (25 Stat. 626.) Schumacher, an Indian, head of a family, had lived upon the land for sixty years, and claimed under the Indian Allotment Act of February 8, 1887 (24 Stat. 388), which provides that where any qualified Indian "shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the

lands are located, to have the same allotted to him or her, and to his or her children," etc. *Both the allotment act and the appropriation of the land by the Indian antedate the grant to the state.*

In the case at bar the grant to the railroad company and the definite location of the road both antedated any Congressional action conferring upon the Indian any right to appropriate public land. The Circuit Court of Appeals recognizes this weakness in its conclusion by the prefatory statment: "While it is true that prior to the Act of March 3, 1875, 18 Stat. 420, extending the homestead privileges to Indians, Congress did not recognize the individual right of an Indian to take a homestead under the homestead law, nevertheless," etc.

With this brief notice may we not appropriately dismiss the question as to the effect of the policy of the Department of the Interior, which, in no event, could be allowed to prevail as against the clear intent of Congress, heretofore declared and concretely applied by this court on previous parallel questions. In this connection and directly to the point we shall presently examine the case of *Buttz* vs. *Northern Pacific Railroad*. (Infra, p. —.) The court has spoken appositely of the Secretary's "supervision" and "direction" in this very grant: "But of course it does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment for the will of Congress as manifested in the granting act." (*Payne* vs. *C. P. Ry. Co.*, supra.)

II.

The grant to appellants' predecessor does not except lands occupied by Indians.

It is fitting first to look to the words of the grant to determine what lands are excepted, for it is conceded that the land in question falls within the primary limits of the grant, as determined by the map of definite location filed August 7, 1871, and that the grant was fully earned.

The grant to California and Oregon Railroad Company was of certain alternate odd-numbered sections: "*and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid shall be selected.*" (14 Stat. 239.)

None of the quoted terms of exception require the application of abstruse rules of logic to determine their meaning. It is clear that prior to the grant to defendants' predecessor these lands had not been granted; they had not been sold; they had not been reserved; they were not occupied by homestead settlers, they were not pre-empted; nor were they otherwise disposed of.

Precisely this question was presented to the Supreme Court in the case of *Buttz* vs. *Northern Pacific Railroad*, 119 U. S. 55. The grant in the Northern Pacific Act was (our italics) of:

"Every alternate section of public land, not mineral, designated by odd numbers * * * whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other *claims* or *rights*, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, * * *." (Act of July 2, 1864, 13 Stat. 365.)

The facts of the Buttz case were, briefly, these: Buttz, a white citizen, occupied the land, and the Northern Pacific Railroad Company brought the action to recover possession in the district court of then territory of Dakota. The trial court gave judgment for plaintiff, which was affirmed by the supreme court of the territory. The lands were in recognized *Indian country*, and the chronology of events is summarized in the following table. The figures in parentheses refer to the pages of the opinion in the 119th volume of the United States Reports:

July 2, 1864—Grant to Northern Pacific Railroad Company. (p. 66.)

May 2, 1867—Indians cede to United States right to construct railroads. (p. 68.)

Oct. 5, 1871—Predecessor of Buttz settled. (p. 63.)

Feb. 21, 1872—Northern Pacific Railroad Company filed its map of location. (pp. 62, 63 and 73.)

Mar. 29, 1873—Indians cede the land to the United States. (p. 69.)
June 22, 1874—Probable effective date of cession. (pp. 69-70.)

It will then be seen that the Indian title to the land in question was recognized by the United States of America until a year or two after the definite location of the road, and it will, of course, be recognized that the railroad company as plaintiff was bound to stand upon the strength of its own title. If the Indian occupancy operated as an exception, the railroad company could not prevail, regardless of the validity or invalidity of the entry made by the predecessor of Buttz, for the possession by Buttz at the time of the suit was of itself a sufficient title as against the railroad company unless the railroad company could show a valid title under its grant. Mr. Justice Field delivering the opinion of the court, said, at page 70:

> "The provisions of the third section, limiting the grant to lands to which the United States had then full title, they not having been reserved, sold, granted, or otherwise appropriated, and being free from pre-emption or other claims or rights, did not exclude from the grant Indian lands, not thus reserved, sold, or appropriated, which were subject simply to their right of occupancy."

It will be observed that the Northern Pacific grant excepts lands not free from *claims* or rights, a restriction not found in the California-Oregon grant. The Circuit Court of Appeals has (R., p.

100) manifestly misconstrued the language of this court in the Buttz case. The court below says the language of the act under consideration in the Buttz case "showed very clearly that Congress intended the grant to become effective as soon as the Indians were removed from the land or as the right of occupancy was terminated." The Supreme Court does not say this, but, on the contrary, holds (p. 70): "*The right of the company to the odd sections within the limits of its grant, covered by the Indian claim, did not depend upon the extinguishment of that claim before the definite location of the line of the road was made.*"

Another point which should not be overlooked is that the Indian claim in the Buttz case was predicated upon aboriginal occupancy by certain Sisseton and Wahpeton Bands of Dakota or Sioux Indians, which occupancy continued until 1867, three years after the grant to the Northern Pacific Railroad Company. The cession from the Indians to the United States was not made until more than a year *after the map of definite location was filed*, and that cession did not become effective until another year had rolled by; yet the title passed by the grant. In the case before us the *Indian occupancy did not commence* until a decade after the lands had become public lands of the United States; there was no aboriginal Indian occupancy. How could Departmental policy, a policy asserted by the court below, but not shown, be held to control the contrary statement of the grant or its specific application by the

Supreme Court in direct conflict with what the court of appeals has held.

Directly to the point we quote from *United States* vs. *Fitzgerald,* 15 Pet. 405, 420, which involved the power of the Commissioner of the General Land Office to withdraw lands for a custom house site so as to defeat a subsequent pre-emption claim. The court says: "No appropriation of public land can be made for any purpose, but by authority of Congress. By the third section of the fourth article of the Constitution of the United States, power is given to Congress to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States. As no such authority has been shown, to authorize the collector at New Orleans to appropriate this land to any use whatever, it is wholly useless to inquire whether his acts, if they had been authorized by law, would have amounted to an appropriation."

III.

There was never any tribal occupancy of this land, and the law never gave recognition to right of individual Indian occupancy until the Act of March 3, 1875.

The year 1875 marks the beginning of individual Indian rights in the public domain. The Act of March 3, 1875, conferred upon the Indian the right to acquire lands under the Homestead Act. (18 Stat. 420.) In *Gritts* vs. *Fisher*, 224 U. S. 640, 642, Mr. Justice Van Devanter, speaking for the court,

declares the policy and effect of Congressional legislation with reference to *The Five Civilized Tribes,* which is equally applicable to the general question of Indian titles. It is there said:

> "Anterior to this legislation the lands and funds belonged to the tribe as a community, and not to the members severally or as tenants in common. The right of each individual to participate in the enjoyment of such property depended upon tribal membership, and when that was terminated by death or otherwise the right was at an end. It was not alienable or descendible. And when children were born into the tribe they became thereby members and entitled to all the rights incident to that relation."

Of similar purport see the case of *Sizemore* vs. *Brady,* 235 U. S. 441, 446-447. A like observation is made in 19 Opp. Atty. Gen. 559 (1890), quoting 19 Opp. Atty. Gen. (1888) 161:

> "The Act of February 8, 1887, together with the preceding acts of March 3, 1875, January, 1881, and July 4, 1884, mark 'a new epoch in the history of the Indians, namely, that in which Congress has begun to deal with them as individuals, and not only as nations, tribes, or bands, as heretofore.' It is dismemberment of the tribes or bands, and absorption, as citizens, of the individuals composing them, by the states and territories containing the lands on which such individuals settle or may be settled, that is the policy of this new legislation. But Congress has not deemed it safe, in making the Indian a freeholder, to give him at once the same control over the land as other freeholders enjoy."

The Act of January 18, 1881 (21 Stat. 315), supplements the Act of March 3, 1875, with relation to certain definitely mentioned Indians. The Act of July 4, 1884 (23 Stat. 96, 98), also supplements and makes more specific the provisions of the Act of March 3, 1875. The Act of February 8, 1887 (24 Stat. 388), goes further; it provides for allotment of lands in severalty to the Indians on the various reservations, and provides further, that every Indian born within the territorial limits of the United States, to whom allotments shall be made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and who has adopted the habits of civilized life, *is hereby declared to be a citizen of the United States*, and is entitled to all the rights, privileges, and immunities of such citizens." Since 1887 this act has been more than once amended for the still further advancement of the Indian in the school of civilization; but with this we have no concern, as it cannot have any bearing upon the issue before us—the question whether individual Indian occupancy of this land from 1859 could have operated to except the land from the grant of July 25, 1866, the grant having been fully earned by the California and Oregon Railroad Company.

There is no room for question that any Indian title initiated subsequent to the treaty of Guadalupe Hidalgo must have been based upon Congressional

authority, for in Congress resided all authority for disposition of the Government's title. We take the liberty of quoting again from *United States* vs. *Fitzgerald*, cited in the second division of this brief:

> "No appropriation of public land can be made for any purpose, but by authority of Congress. By the third section of the fourth article of the Constitution of the United States, power is given to Congress to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States."

We think we have unearthed every scrap of Congressional legislation with reference to Indian titles in California, and nowhere is there found any legislative basis for any Indian claim to the lands here in controversy. There being, then, no Congressional authority for the Indian claim, and the grant to California and Oregon Railroad Company not excepting lands occupied by Indians, what is there left upon which to base an issue?

IV.

Outline history of Indian titles in California from the standpoint of Congressional action and judicial interpretation.

Fundamentally Indian titles in California do not differ from Indian titles elsewhere in the United States; and yet there is an important distinction in that, elsewhere than in California, the Indians "*have yielded their lands, by successive treaties, each of which contain a solemn guarantee*

of the residue." (*Cherokee Nation* vs. *Georgia,* 5 Pet. 1, 14.) This is the basis of Indian possessory rights in most places outside of California. Within the bounds of this state, however, the Government has not bargained with the Indians. The times, the aftermath of the Mexican war, the discovery of gold, the civil war—all were contributing causes which lead to the application here of the ancient rule which Chancellor Kent says has never been questioned, that the United States has "the exclusive right to extinguish the Indian title by purchase or *conquest.*" (3 Kent's Commentaries, p. 380.) Pre-eminently in California the Indian possessory title is the mere privilege of possession. We say "privilege" advisedly. Even where there existed a treaty guarantee as declared in *Cherokee Nation* vs. *Georgia* (supra), which was the situation in the Buttz case, this court followed in this respect its numerous previous utterances to the same point, dating back to the time of Chief Justice Marshall, that the Indian title is merely a sufferance, so far as the United States is concerned. (*Johnson* vs. *McIntosh,* 8 Wheat. 543, 547; *Worcester* vs. *Georgia,* 6 Pet. 516, 544.) Indian possession does not even rise to the dignity of a *claim* within the meaning of railroad grants of the fee in lands free from "rights" or "claims". This, too, is held in the Buttz case. Even in the case at bar the courts below held that the United States may remove the Indians. Clearly it could not if a *right* had attached.

The Circuit Court of Appeals has overlooked the distinction between Indian *rights* guaranteed by

treaty and mere squatter *privileges;* it has given scant consideration to the opinion of this court in the Buttz case; and it has wholly ignored another decision of this court directly upon Indian possessory titles in California, which, we respectfully submit, is conclusive against the appellee. The case last referred to is *Barker* vs. *Harvey*, 181 U. S. 481. But, the consideration of that case logically closes this *"Outline history of Indian titles in California from the standpoint of Congressional action and judicial interpretation."* We therefore defer the review of *Barker* vs. *Harvey* to the conclusion of this division of the brief (Infra, p. 40).

We have direct and convincing evidence, not only in the earlier acts of Congress, but also in the debates in the Senate and in the House, where is reflected the history and spirit of the times, that Indian titles and possessory claims in California were, from the beginning of our state history, designed by Congress to be foreclosed and extinguished, except in so far as specific reservations might have been made for Indian accommodation. When the act to ascertain and settle the private land claims in the State of California, approved March 3, 1851 (9 Stat. 631), was undergoing consideration in the Senate (which covered a period of several months), Senator Thomas A. Benton of Missouri, waging a bitter fight against its passage, said, on January 8, 1851:

> "The second section provides that '*all persons*' I apprehend that would include everybody, old and new settlers, inhabitants of towns or

> inhabitants of the country, white men or **domesticated Indians,** inhabitants of pueblos or missions, as well as those upon a rancho. It is '*all persons*'. They are required to do—what? '*All persons claiming land in California by virtue of any right or title,*—those which are perfect as well as those which are inceptive. So that he who holds by a full title, a perfect title, which would never be questioned nor disturbed —which would never require any further act to be done to or about it, except to fix boundaries—is here required to be brought up, and is subject to have his home returned into the mass of the public property of the United States, either in the event of a decision against him, or in the event of his failing to do things which this bill requires to be done. * * *
>
> "Now, Mr. President, what is to be the operation of this? All persons—**Indians,** as well as white persons—are to come before this board of commissioners * * *." (Congressional Globe, Vol. 23, Appendix, p. 61.)

Again on January 28, 1851, Senator Benton invites specific attention to the effect of the act on Indian possessory claims. We have supplied the italics:

> "Look at the beginning of the 8th section and you will see what is involved. Look, sir, at section 8th, and you will there find that 'each and every person claiming lands in California by virtue of any right or title derived from the Mexican or Spanish Government shall present the same to said commissioners, when sitting as a board,' &c. These are the words of the section to which the two cases of forfeiture apply; and they include all the claims of everybody! Who is left behind? What man, what woman, what child, *what Indian is left behind,*

> when 'each and every person' is included? What land is left behind? None!" (Congressional Globe, Vol. 23, p. 362, column 1.)

When we come to consider the case of *Barker* vs. *Harvey* we shall see that the United States Supreme Court gave the act precisely that construction in its relation to Indian claims.

It is manifest, then, that the relation of the Act of March 3, 1851, to Indian possessory claims in California was fully considered by Congress and was deliberately intended to have the effect ascribed to it by Senator Benton. When the bill reached the House it was said by Representative Bowlin that the House "had not passed a bill for ten years that had been so fully and thoroughly discussed and investigated as that bill was in the Senate." (Congressional Globe, Vol. 23, p. 777.)

Following closely upon the heels of this act for the settlement of private land claims in California there were submitted to the Senate eighteen several treaties negotiated by accredited agents of the United States with the California Indians, of which the treaty pleaded in the amended complaint in this case is one. In the aggregate those eighteen treaties purported to cede to the United States Indian lands aggregating from seven to ten million acres. These eighteen treaties passed through the hands of the Secretary of the Interior and the President of the United States and were transmitted, without recommendation of either official, to the Senate where, on July 8, 1852, every treaty was unanimously rejected.

The ten million acres were appropriated by the Government, but not by *cession*. No; we exercised what Kent is pleased to term the unquestioned right of conquest. The opinion of the District Court in this case takes cognizance of the proposed treaty mentioned in the amended complaint. (R., p. 42.) But these lands are not within the proposed reservation. (Id.)

The *Indian land*, proposed to be ceded, was, as this court may judicially know, surveyed by the Government and thrown open to settlement, much of it before the date of our grant; and all, or substantially all, is today held in private ownership by the whites. This court may also judicially know from the public records of Congress that during the past two years some of the descendants of these early Indian claimants, through the intervention of certain Caucasian agents, have strenuously pressed their demands for compensation on account of these vast areas of land which, it is contended, were taken from them following the treaty negotiations and without compensation.

There was a reason, and a cogent one, for the delimitation of Indian land claims in California at that early period. The Indians of California, then notoriously hostile—and why not? We were acquiring their lands, as Kent says, by *conquest*—were a serious menace to the white population, and a difficult problem for the National Government's solution. Indian *rights* were an *abstract idea*, an ineffective barrier against Caucasian advance.

"Gold!" was the cry heard across the continent, which, more than any other influence, brought on the white invasion of the red man's domain and forced him to fight or give way. He did both. Some conception of this state of affairs may be gained from the President's message to Congress of December 2, 1851, where it is said:

> "The Indians in California, who had previously appeared of a peaceable character, and disposed to cultivate the friendship of the whites, have recently committed several acts of hostility. As a large portion of the reinforcements sent to the Mexican frontier was drawn from the Pacific, the military force now stationed there is considered entirely inadequate to its defense. It cannot be increased, however, without an increase of the army, and I again recommend that measure as indispensable to the protection of the frontier." (Congressional Globe, Vol. 24, Part I, p. 19.)

The economic side of the question may be partially appreciated from a reading of the speech of Hon. J. W. McCorkle in the House of Representatives in Committee of the Whole on the state of the Union in behalf of California interests, on August 30, 1852. He says:

> "Among the questions of importance which first attracted the attention of 'the Democratic Congress,' after the admission of California as a state into the Union, was the condition, control, and management of the Indians. An appropriation was made, and the President authorized to appoint three Commissioners, with full powers to treat with them, and to make such other arrangements as the circumstances might require. As in other cases, in pursuance of

> the fixed policy toward California adopted by the present administration three gentlemen, entirely ignorant not only of the country, but especially of the nature and habits of our Indians, were sent out from the Atlantic to protect the people of the Pacific from savages who inhabit our State. These men, as might be expected under the circumstances, have committed the most egregious blunders, and find opposed to them and the policy they adopted not only the entire population of California, but the Senate of the United States, which has rejected every treaty made by them with the Indians, unanimously. The enormous debts, amounting in all to nearly $1,000,000 have been repudiated; and, unfortunately, while justly depriving these imported officers of their portion of the profits and speculation, many innocent third parties, who from their ranches and stores have, in good faith, furnished them supplies, are also compelled to suffer losses." (Cong. Globe, Vol. 25, p. 1082.)

That same day Congress passed an appropriation bill in relation to Indian affairs in California. (10 Stat. 56.) This bill embraces a unique proviso which we have italicized:

> "For the preservation of peace with those Indians who have been dispossessed of their lands in California, until permanent arrangements be made for their future settlement, the sum of one hundred thousand dollars; *Provided, That nothing herein contained shall be so construed as to imply an obligation on the part of the United States to feed and support the Indians who have been dispossessed of their land in California.*"

Mark, this is the voice of the guardian. Although the guardian's responsibility seems to rest lightly,

nevertheless, Congress a few months later made a substantial appropriation for Indian subsistence. Congress recognized the economic necessity of the case, and on March 3, 1853, made a reservation provision which would seem to be adequate to the situation. This act provides for five reservations in the State of California, or the territories of Utah and New Mexico, bordering on California. These reservations were authorized to the full extent of 125,000 acres, and it was left to the discretion of the President whether the entire area should be taken from the public domain in California, or near its borders in Utah and New Mexico; but it was provided that no reservation should be made upon any lands *inhabited by citizens of California*. Two hundred and fifty thousand dollars was at the same time appropriated to defray the expenses of supporting the Indians in California and removing them to these reservations. The act further provided for the abolishment of the existing Indian agencies in California, the plain intent deducible from this being that no Indian *possessory claim* in California was recognized by Congress. For the sake of expedition the act went so far as to provide that the President might immediately negotiate with the Indians for the purpose of *furthering peaceable settlement of the white population on tribal lands and extinguishing the tribal claim*. (10 Stat., p. 238.)

Responsive to the power conferred upon the President a plan was submitted for three reservations in California, and the work of removing the Indians was commenced. On July 31, 1854, Con-

gress made another appropriation "for defraying the expenses of continued removal and subsistence of Indians in California" in the sum of $200,000, with further appropriation for incidental purposes. (10 Stat. 352.) On March 3rd, 1855, a further appropriation was made to the same end and "for collecting, removing and subsisting the Indians of California" on two additional reservations, with further proviso that the President might enlarge the quantity of reservations theretofore selected. (10 Stat., pp. 698, 699.)

Authority to increase the number of Indian reservations in California was granted by the Act of February 28, 1859. (11 Stat., p. 400.) It was in this same year that our Indians, according to the courts below (the Indians themselves say it was 1873, R., 67) emerged from nowhere in particular and settled upon these lands, which for nine years had been *public domain*, free of any claim by Indian or white. In the meantime our governments, both national and state, had been spending millions in California in defense against Indian outrages and depredations. The obvious plan of all this legislation was to remove the Indians from the public domain and concentrate them in a few reservations. Before the close of the civil war the question of Indian possessory titles in California was forever put at rest, so far as Congress is concerned, by the Act of April 8, 1864. (13 Stat., p. 39.) That act provided in the second section for reservations not exceeding four in number, which should be sufficient

for the accommodation of all the Indians in California, it being expressly required that these reservations be located as remote from white settlements as might be found practicable. The contemplated reservations might or might not include previously existing Indian reservations, in the discretion of the President. The third section of the act is an unqualified declaration of Congress that all other Indian lands, including lands theretofore reserved for the Indians, were to become public domain. We quote section 3 in full:

> "*And be it further enacted*, That the several Indian reservations in California which shall not be retained for the purposes of Indian reservations under the provisions of the preceding section of this act, shall, by the commissioner of the general land-office, under the direction of the Secretary of the Interior, be surveyed into lots or parcels of suitable size, and as far as practicable in conformity to the surveys of the public lands, which said lots shall, under his direction, be appraised by disinterested persons at their cash value, and shall thereupon, after due advertisement, as now provided by law in case of other public lands, be offered for sale at public outcry, and thence afterward shall be held subject to sale at private entry, according to such regulations as the Secretary of the Interior may prescribe: Provided, That no lot shall be disposed of at less than the appraised value, nor at less than one dollar and twenty-five cents per acre: *And provided, further*, That said sale shall be conducted by the register and receiver of the land-office in the district in which such reservation or reservations may be situated, in accordance with the instructions of the department regulating the sale of public lands."

For each reservation there was provided an Indian agent, who was required to reside upon the reservation "*and all offices and employments connected with Indian affairs in California not provided for in this act be, and the same are hereby abolished.*" Is it not manifest from the third section of the act and from the closing words of the eighth and last section, above quoted and italicized, that Congress intended and provided for the removal of all Indians in California to the several reservations, and that all other Indian land titles and claims should thereby be deemed extinguished? All offices and employments connected with the Indian affairs in California other than the *one superintendency* and the *four agencies* were abolished. No *individual* Indian claim had at that time ever been recognized, and no provision was made or left in the law for governmental supervision or oversight of tribal Indians not removed to reservations; *all* were to be collected and removed to the four reservations, where the four several agents, answerable to the one superintendent and under the ultimate control of the Secretary of the Interior, were thenceforth responsible for the location of the Indians within the restricted limits of the several reserves.

It was not the Indians residing on reserves who made necessary this last act of Congress for the better organization of Indian affairs in California; it was that very considerable portion of the Indian population which had not at that time been removed to the previously constituted reservations, and those

who had escaped from the reservations, and the constantly increasing pressure of the white citizenry, crowding back and ever back the tribes and bands of Indians still living in their old haunts. Relevant to this point is the report of the Indian Commissioner to the Secretary of the Interior, dated October 31, 1863, and found in Senate Documents, First Session, 38th Congress 1863-1864, Volume 3, page 133. There the Commissioner suggests a consolidation of the northern and southern districts (districted under the Act of June 19, 1860, 12 Stat. p. 57) under one superintendent, and says: "Within the northern district there are four reservations owned by the government, viz.: Klamath, Mendocino, Nome Lacke and Round Valley. The first three of these are almost worthless as reserves * * * they are almost entirely abandoned by the Indians". We refer also to the speech of Senator James R. Doolittle, of Wisconsin, advocating the passage of the bill. (See Congressional Globe 1863-1864, Part II, page 1209, where Senator Doolittle speaks of constant expensive warfare with the Indians in California.)

Senator Fessenden, of Maine, raised the question as to the extent of the purchases which might be made by the government for enlargement of the reservations, and Senator Conness, of California, the originator of the bill, said: "In my opinion no acre will be purchased under that power. There will be no need to purchase any; but on the contrary, some of the existing reservations will be sold."

Here, too, is exhibited the disposition of the Senate to restrict, rather than to extend, recognition of Indian land claims. Although the then existing reservations were more than adequate in extent, as evidenced by the quoted statement of the California senator, the act left something to the discretion of the President as to the best location and the adequacy of the area of the four proposed reservations, for the accommodation of all the Indians of California. "Under the provisions of this act four reservations were selected and set apart by the President: (1) The Tule River reservation, by executive order of October 3, 1873. Modified by executive order August 3, 1878. By this last order a part of the lands included in the order of October was restored to the public domain. (2) The Hoopa Valley reservation, by executive order of June 23, 1876. It appears to have been suggested, that the Klamath reservation should be included within or in some way attached to the Hoopa Valley reservation. But this suggestion does not seem to have been adopted. In the executive order the boundaries of the latter reservation are distinctly defined. They embrace an area of 89,572.43 acres; but do not include any portion of the abandoned Klamath River reservation. (3) Round Valley reservation, by executive orders of March 30, 1870; April 8, 1873; May 18, 1875; and July 26, 1876. (4) Reserves for Mission Indians, by executive orders of January 31, 1870; December 27, 1875; May 15, 1876; August 25, 1877; and various orders and modifications of orders unnecessary to enumerate." *United*

States vs. *Forty-eight Pounds of Rising Star Tea,* 35 Fed. 403, 405.

That it was not the reservation Indians, but those tribes and bands who still roamed at large over the public domain that prompted this latest act of Congress is shown by the further remarks of Senator Doolittle (Id.):

> "And now since the discovery and opening of California and Oregon and Washington territory, wherever population is setting in upon the Pacific Coast, and advancing from the Pacific Coast eastward, the Indians are driven to the mountains, and the mountains being discovered to abound with gold our hardy and energetic pioneers are in the mountains, and the Indians are being driven and scattered everywhere. Their game, their means of living, being destroyed, they are reduced to that condition where from the very necessities of their position they are some times tempted to plunder upon the white population, to steal, in order to live, rather than starve. This course of proceeding on their part leads to conflicts upon the border beyond the reach to a certain extent of the power of our laws and their administration; and these conflicts between the Indians and the white inhabitants lead us to war and millions of expense to the destruction of the Indian race."

Previously, and on the same page, Senator Doolittle says:

> "Perhaps it is not known to the Senate, but such is the fact, that in some portions of California there has existed almost continual war between some of our troops and some of the Indians, and these war expenses are the

enormous expenses connected with the administration of Indian affairs."

On July 27, 1868, Congress itself restored the Mendocino reservation to the public domain, thus directly setting in motion, to this extent, the power of the Secretary of the Interior to dispose of Indian lands reserved but not required for that purpose. (15 Stat., p. 198.) A portion of the Round Valley Indian reservation was restored in the same manner on March 3, 1873. (17 Stat., p. 633.)

In the *Smiley Commission* Act of January 12, 1891, Congress recognizes a total lack of Indian right as against railroad grants, regardless of Indian possession. (26 Stat. 712.) Section 3 provides that such lands may be acquired by the government for the use of the Indians by exchange of "an equal quantity of other land of like value in lieu thereof," but this requires negotiation by the government with the railroad company as between individual and individual. The same recognition is given in divers other acts of Congress, particularly the amendment of March 1, 1907, to section 3 of the *Smiley Commission* Act, wherein the Secretary of the Interior is authorized to set apart and patent to Mission Indians in California lands which have been found "upon investigation to have been in the occupation and possession of the several bands or villages of Mission Indians," but no patent issued under the provisions of that act was to "embrace any tract or tracts to which valid existing rights have attached in favor of any person under

any of the United States laws providing for the disposition of the public domain, unless such persons shall acquiesce in and accept the appraisal provided for in this act in all respects and shall thereafter, upon demand and payment of such appraised value, execute a release of all claim and title thereto." (34 Stat. 1022-1023.) The same recognition of lack of Indian claim is given in the Act of March 4, 1913 (37 Stat. 1007) for the relief of Indians occupying railroad lands in Arizona, New Mexico, or California.

Look, now, at the report of the Commissioner of Indian Affairs to the Secretary of the Interior, for the year 1890, where, at page XXX it is said:

> "The Indian title has been extinguished to all the public domain, except Alaska, and the portion included in one hundred and sixty-two Indian reservations, not embracing those in New York already referred to nor that occupied by the Cherokees in North Carolina, and by the Sacs and Foxes in Iowa, both of which were acquired by purchase."

No treaty was ever made by the United States with any California tribe, and on March 3, 1871, Congress put an end to the treaty making power of our government with the Indians. This act provides that no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty. (Rev. Stat. 2079.) Up to this time the

Indian had uniformly been dealt with by our government in his tribal or communal relation, and not as an individual, and no individual Indian claim or title was recognized until four years after the treaty making power had been abolished. We come now to the consideration of *Barker* vs. *Harvey*, 181 U. S. 481, to which we have heretofore adverted.

Barker and his co-defendants were Mission Indians who had been in immemorial possession of the lands sued for. The action, in ejectment, was brought in the Superior Court of San Diego County by Harvey and others, claiming title under a patent from the United States, dated January 16, 1880—pursuant to Mexican grant, it is true; but Mexico respected the right of Indian occupancy. Plaintiffs recovered judgment for possession, which judgment was affirmed on appeal to the state Supreme Court. On writ of error in the United States Supreme Court the judgment was again affirmed. On the trial of the present case the learned judge of the District Court distinguished the case cited upon the ground that the Mission Indians in *Barker* vs. *Harvey* had been in possession from time immemorial, whereas the Indians with which we are now concerned traced their possession back only to 1859. (R., p. 44.) Surely the government cannot find much solace in this distinction, for it is inconceivable that Indian possession from 1859 would be more effective as title than possession running back to a period whereof the memory of man runneth not to the contrary. Parenthetically let us notice

Thompson vs. *Doaksum,* 68 Cal. 593, where the Indians claimed continuous possession since October 1, 1492. Nevertheless they were ejected by Thompson, a patentee, on the strength of the Act of March 3, 1851. Let us concede to the Indians in the present case more than the record justifies, and assume that the ancestors of Ellen Ruff and Maggie Wall held possession prior to the Mexican treaty. It would simply be another case of *Thompson* vs. *Doaksum,* fundamentally.

In principle there is no shade of difference between the case of *Barker* vs. *Harvey* and the case now before this court. In the former this court says in the statement of the case (181 U. S., p. 482) that "the defendants do not claim a fee in the premises but only a right of permanent occupancy by virtue of the alleged fact that they are Mission Indians, so-called, and had been in occupation of the premises long before the Mexican grants, and, of course, before any dominion acquired by this government over the territory; insisting, further, that the government of Mexico had always recognized the lawfulness and permanence of their occupancy, and that such right of occupancy was protected by the terms of the treaty and the rules of international law."

Commenting upon this phase of the case the court said at pages 486-487:

> "Undoubtedly by the rules of international law, and in accordance with the provisions

> of the treaty between the Mexican government and this country, the United States were bound to respect the rights of private property in the ceded territory. But such obligation is entirely consistent with the right of this Government to provide reasonable means for determining the validity of all titles within the ceded territory, to require all persons having claims to lands to present them for recognition, and to decree that all claims which are not thus presented shall be considered abandoned."

The "reasonable means" provided by Congress and referred to by the court were embodied in the act approved March 3, 1851. That act need not be considered at length; we have already noticed its pertinent features. The Supreme Court in the case cited, however, gives the act extended notice, and considering former cases construing that act, says in part at page 487:

> "*Botiller* vs. *Dominguez*, 130 U. S. 238, the last case cited in the foregoing quotation, deserves special notice. The Supreme Court of California had held in several cases that a perfect title need not be presented to the land commission; that it was recognized by the treaty of cession, and required no further confirmation; that the act to ascertain and settle private land claims applied only to those titles which were imperfect and needed the action of some tribunal to ascertain and establish their validity. But in this case, which came from the Supreme Court of California, we held the contrary."

It will be recalled that before the act passed the Senate, Senator Benton had declared the same con-

clusion here expressed by the United States Supreme Court.

Continuing upon the same point, at page 492, the court also said:

> "Again, it is said that the Indians were, prior to the cession, the wards of the Mexican government, and by the cession became the wards of this government; that, therefore, the United States are bound to protect their interests, and that all administration, if not all legislation, must be held to be interpreted by, if not subordinate to, this duty of protecting the interests of the wards. It is undoubtedly true that this government has always recognized the fact that the Indians were its wards, and entitled to be protected as such, and this court has uniformly construed all legislation in the light of this recognized obligation. But the obligation is one which rests upon the political department of the government, and this court has never assumed, in the absence of Congressional action, to determine what would have been appropriate legislation, or to decide the claims of the Indians as though such legislation had been had. Our attention has been called to no legislation by Congress having special reference to these particular Indians."

In the *Botiller* vs. *Dominguez* case, *supra*, the point was made in argument that the Act of 1851 violated the Treaty of Guadalupe Hidalgo, but the court held:

> "That so far as the Act of Congress is in conflict with the treaty with Mexico, that is a matter in which the court is bound to follow

> the statutory enactments of its own government. If the treaty was violated by this general statute enacted for the purpose of ascertaining the validity of claims derived from the Mexican government, it was a matter of international concern, which the two states must determine by treaty, or by such other means as enables one state to enforce upon another the obligations of a treaty. This court, in a class of cases like the present, has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard. *The Cherokee Tobacco,* 11 Wall, 616; *Taylor* vs. *Morton,* 2 Curtis, 454; *Head Money Cases,* 112 U. S. 580, 598; *Whitney* vs. *Robertson,* 124 U. S. 190, 195."

It must be obvious, then, that the law is settled beyond argument that Indian claims asserted under the Mexican government and extended down through the Mexican cession by the treaty of Guadalupe Hidalgo, must have been presented to the Commission under the Act of March 3, 1851, or the United States of America would refuse to recognize them. In this connection the court gives particular attention to section 16 of the Act (page 492):

> "By the act creating the land commission the commissioners were required (sec. 16) 'to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians.' It is to be assumed that the

> commissioners performed that duty, and that Congress, in the discharge of its obligation to the Indians, did all that it deemed necessary, and as no action has been shown in reference to these particular Indians, or their claims to these lands, it is fairly to be deduced that Congress considered that they had no claims which called for special action."

While it is not shown that the commissioners reported to the Secretary the tenure by which the predecessors of Ellen Ruff and Maggie Wall held their lands, it is shown that the Indian agents did report it in the shape of a proposed treaty. It is shown, too, that the upper house of Congress unanimously rejected the treaty. Thereafter all legislation in that behalf was to the single purpose of concentrating all the Indians on restricted reservations.

V.

The evidence is insufficient to support the finding that the Indians occupied the land in controversy prior to the investiture of the fee in appellants' predecessor.

All that has gone before presupposed Indian occupancy from a time antedating the investiture of title in defendants' predecessor, but there is another angle to this inquiry. We challenge the sufficiency of the evidence to sustain the finding that these particular lands were occupied by the Indians prior to defendants' grant (July 25, 1866), or even prior to the date of the definite location of the road (August 7, 1871), when the fee vested, as of the date of the grant. (*Van Wyck* vs. *Knevals*, 106 U. S.

360.) Of the early settlers who testified concerning the Indian possession, the first one, L. B. Luttrell, said (R., p. 52):

> "Maggie Wall has not always lived in the same house since witness has known her. She lived further down a few hundred yards from her present house. She moved into the present house a good many years ago."

The witness James D. Fairchild knew nothing of the early occupancy (R., pp. 52-53).

The witness James W. Reynolds says:

> "A mile square would cover every distance around from where they lived. They may have moved a little. He didn't know whether they have moved; but they have not moved a mile from where they were when I first came to the country. The house of Ellen Ruff is on Duzel Creek; witness cannot fix its location more precisely. He does not know how long that house has been there. The present house was not there in 1904, and witness has no means of knowing when it was built. You can take it from where they live now and take it a mile either north, west, east or south, and I think it would cover every movement they have made in the last 25 years. George and Maggie Wall were not in their present house 15 years ago. Had a kind of wickiup house when witness was there. It may have been within a quarter of a mile of the present house, witness could not be certain." (R., p. 54.)

Peter H. Luttrell testified:

> "He knew Ellen Ruff since 1859. She was then but five years old. Her father, Captain

Jack, was killed in 1858, and was buried on the place, later taken up by the father of the witness (the place—not the body). Ellen Ruff then lived on Moffet Creek. The Indians lived in wickiups built of bark and dirt. In 1866 they had a wickiup, and whenever they went off on a hunt, or to a new place, they would burn these wickiups before they left. . . . . The Indians were then within a quarter or a half of a mile of the same place. . . . There was an Indian burial ground on this land, but the last Indian burial there was in 1859. There were no Indians buried on the place of Maggie Wall or Ellen Ruff but there were burials further up the creek. The Indians would move their wickiups and villages up and down the creek within a half or three-quarters of a mile; they moved back and forth. Witness does not know how long Ellen Ruff has lived in her present house.

"He does not know where the corners of Sections 13 or 23 are located, nor upon what section or sections these Indians are living. He does know the creek they were on. It was called Duzel Creek, but in the early days it was known as the south fork of Moffet Creek. . . . Witness does not know how long Maggie Wall has occupied the present residence. Her father had his wickiup a little way below there, across the creek. Afterwards he moved his improvements and wickiup up onto the same side that George Wall was. Whenever they wanted to move in those days they simply picked up their outfit and moved, but in later years they commenced to settle. It was about 1870 they commenced to settle close together, because they were given warning they would lose all their claims, and would have no homes, but the old timers are all dead. Maggie Wall's father used to live across the creek on the land now owned by the defendants Cramer. That is

not the land involved in this action, but a ranch in the vicinity claimed by the Cramers.

"There was a bunch of Indians there up and down the creek. Then a brother of the witness in 1870 got an appropriation for those Indians and bought them a number of horses and wagons, harness and belongings and told them to fix up little places and go to work and raise vegetables. He staked out a country for them on Moffet Creek. The place thus staked out would take in the Cramer claim and Ellen Ruff's place and George Wall's place. It started at a big pine tree. They blazed out a place and told them to stay there. That was at the time of the Modoc war. It was J. K. Luttrell and Judge Steel who went over and did it." (R., 55-57.)

This evidence, received over the objection of defendants, (R., p. 50), falls far short of establishing the original and continued occupancy of these Indians upon the precise lands described in the amended bill. It seems quite probable from this testimony that the settlement upon these particular lands was not made until in the seventies, when J. K. Luttrell and Judge Steel forced the Indians off areas desired by the whites and required them to settle where they now are. In this state of the case, upon the filing of the second amended bill, defendants recognizing that in the new form the question of possession might be relevant, though not admitted to be material, offered to prove:

"That these Indians, by their own statements —and we have the certified copies of the answers filed by them in suits in the Superior Court of Siskiyou County involving these same

lands, being a possessory action—the statement of these Indians in their verified answers, to the effect that they settled on these lands only as early as 1873, that they disclaim any relation of wardship to the Government, they repudiate the authority of the United States to enter into the leases introduced in evidence in this case.

"We offer to prove, further, that these Indians have been taxed by the local state authorities and county authorities, and that during the period of indigency they received aid from the local county authorities, and that the United States has never exercised any authority as a guardian in any sense." (R., p. 67.)

The offer was rejected upon the ground that possession was made an issue in the original form of the action. Thereupon defendant asked leave of the Court to reopen the defense for the purpose of introducing that proof, still contending that the alleged treaty reservation was the only material issue in the beginning. Leave to reopen the defense was forthwith denied, and the defendants duly excepted. No theory is apparent to us which could render material the question when Indian possession commenced. Nevertheless the Circuit Court of Appeals held that "as the lands were actually occupied and lived upon and improved by the Indians they were not public lands, as included within the general land laws of the United States, and hence they did not pass under the grant to the railroad company, which was authorized to take lieu lands." We seek in vain for any provision in the grant of July 25, 1866, or in any other railroad grant authorizing the

grantee to select lieu lands, or indemnity, on account of Indian occupancy of areas within the primary limits.

However, plaintiff having introduced evidence upon the question of occupancy, and having later, by leave of the court amended the proceeding so as to make the question relevant, if not material, and the evidence upon the issue being uncertain and inconclusive, defendants should have been afforded an opportunity of introducing proof from the best available source, the Indians themselves, as to when their occupancy of this particular land had in fact commenced.

VI.

Upon failure of the Government's allegation that the land was within an Indian reservation the cause abated for (1) change of cause and parties; (2) incapacity of plaintiff to sue for want of interest; (3) lack of jurisdiction; and (4) because of prior action pending in the state court involving the changed issue.

For the purposes of this division we do not question the finding of Indian occupancy from 1859; nor do we maintain that the plaintiff did not have the capacity to sue nor the court jurisdiction to entertain the action for cancellation of the patent upon the alleged ground that the land was excepted from the operation of the grant by virtue of an Indian reservation declared in an alleged then pending treaty. These jurisdictional issues, however, were resolved in favor of the defendants, and the finding

in defendants' favor is not questioned in the court of appeals nor in this court. These facts being found in defendants' favor, plaintiff abandoned the essential jurisdictional issues and injected something entirely new and outside of the scope of the original pleadings. Plaintiff changed its character as a party in interest and stepped out upon the judicial stage in the regalia of guardian, asserting the Indian's right of possession, when that assumed right had never been challenged, and without any allegation that it had been challenged.

The Circuit Court of Appeals declares that the government did have the capacity to maintain this suit in the dual capacity of proprietor and guardian, and cites *United States* vs. *Board of County Commissioners of Osage County*, 251 U. S. 128, and *Heckman* vs. *U. S.*, 224 U. S. 413. In neither case has the United States sued in its dual capacity; in both it has proceeded pursuant to express statute or treaty obligation. In the authority first cited the United States sued under express statutory authority on behalf of all non-competent members of the Osage tribe. Mr. Chief Justice White, delivering the opinion of the court, said: "Certain is it that as the United States as guardian of the Indians had the duty to protect them from spoliation and, therefore, the right to prevent their being illegally deprived of the property rights conferred under the Act of Congress of 1906, the power existed in the officers of the United States to invoke relief for the accomplishment of the purpose stated. Indeed the Act of

Congress of 1917, providing for the appraisement of the lands in question, by necessary implication, if not in express terms, treated the power of the officers of the United States to resist the illegal assessments as undoubted." (p. 133.)

In the Heckman case the object of the suit was to cancel certain conveyances of allotted lands made by members of the Cherokee Nation. Here, too, the court says the United States granted the lands to the Cherokee tribe "and obligated itself by the terms of these treaties and of its laws to protect the Cherokee tribe in the enjoyment of the lands granted;" also that the members of the Cherokee tribe "are without power to dispose of any interest in the lands *without the authority of the United States*". (p. 416.) Mr. Justice Hughes says at page 437, quoting from *Tiger* vs. *Western Investment Co.*, 221 U. S. 286: "that in the present case when the act of 1906 was passed, the Congress had not released its control over the alienation of lands of full-blood Indians of the Creek Nation; that it was within the power of Congress to continue to restrict alienation by requiring, as to full-blood Indians, the consent of the Secretary of the Interior to a proposed alienation of lands such as are involved in this case; that it rests with Congress to determine when its guardianship shall cease, and while it still continues it has the right to vary its restrictions upon alienation of Indian lands in the promotion of what it deems the best interest of the

Indians. During the continuance of this guardianship, the right and duty of the Nation to enforce by all appropriate means the restrictions designed for the security of the Indians cannot be gainsaid."

It is seen, therefore, that in both cases cited in the opinion of the Circuit Court of Appeals the government was suing under express Congressional authority and direction. In the Osage case the government appeared on behalf of the entire non-competent class, as a guardian, and asked an injunction against infraction of Indian rights guaranteed by Congress. In the Heckman case it sued for a cancellation of conveyances made contrary to Congressional inhibition. But what interest has the United States in an individual claim of the character now before the court, after Congress has conveyed the fee? It is settled, we think, both by state and federal decisions, that one cannot maintain an action in both his individual and his representative capacities, at least in a case where the party in his individual capacity has no interest distinct from the interest held in its representative capacity. The rule is well illustrated in the case of *Dias* vs. *Phillips*, 59 Cal. 293, where the court says: "Plaintiff brings this suit in his individual right, and also in his representative capacity, as executor. * * * The question was raised by the demurrer whether the suit was properly brought by the plaintiff in a double capacity, and we think the objection to the complaint should have been sustained. The right of action was in him or in the estate, and not in

both." The government owes these Indians no duty on the question of land claims. The only word of Congress upon the subject is the repeated direction that these Indians be removed from the public domain and placed upon reservations provided for them, and that even previously existing reservations be disposed of as public domain.

Concede for the sake of argument that Ellen Ruff and Maggie Wall have a substantial claim; they live separate and apart from any tribe or band; they have taken up the civilized mode of life, and they are citizens in the fullest sense of the term. On May 8, 1906 (34 Stat. 182), Congress amended the general Allotment Act of February 8, 1887 (24 Stat., p. 388), whereby provision was made for patent in fee simple to Indian allottees in general, "and thereafter all restrictions as to sale, incumbrances or taxation of said lands shall be removed," etc.

The case is not distinguishable from *United States* vs. *Waller*, 243 U. S. 452. That case was brought on behalf of Indian wards to recover lands. The Supreme Court recognizes the wardship for general purposes, but denies the capacity of the United States to maintain an action for the recovery of the Indian lands. The Indians were allottees of the White Earth Reservation. According to the complaint the defendant Waller fraudulently procured a conveyance of these lands unto himself. Now, on June 21, 1906 (34 Stat. 325, 353), a little

more than a month after the general act lifting the restrictions from Indian alienation of lands, Congress adopted what is commonly known as the Clapp Amendment, which conferred substantially the same privileges upon the White Earth Indians. This court, speaking through Mr. Justice Day, says (243 U. S. 452):

> "In the case now before us, in whatever other respect the Government of the United States may continue to hold these Indians as wards, needing and receiving protection from its authority over their persons and property, as to the lands in question the United States, in the passage of the Clapp Amendment, evidenced its purpose to grant full power and control to the class named. As to them the Government has no further interest in or control over the lands."

What, then, is the situation? These Indians entered this part of the public domain as squatters. Their assertion of claim is not based on *occupancy initiated under any law of the United States;* it is simply such adverse claim as any citizen might make to land patented to another. The United States clearly was neither legally nor morally bound to maintain these Indians in possession of lands to which they made no claim prior to that of the Government; and since the United States has conveyed its title, what circumstance has arisen to impose upon it any obligation to the Indians with reference to these lands? True, the government may owe the Indians the duty of protection, shelter and sustenance, but even that may be questioned where the

Indians have adopted the civilized mode of life and have not availed themselves of the protection and care afforded them by the government reservations. In any event what justification is there for commandeering private property in the performance of the government's duty of subsisting the Indians. The failure of this action by virtue of the government's lack of interest is well supported by precedent. We shall content ourselves with the citation of a familiar case, *United States* vs. *San Jacinto Tin Co.*, 125 U. S. 273, 285, which is quoted with approval in *Curtner* vs. *United States*, 149 U. S. 662, 672, both being actions essentially similar to this:

> "In all the decisions to which we have just referred it is either expressed or implied that this interest or duty of the United States must exist as the foundation of the right of action. Of course this interest must be made to appear in the progress of the proceedings, either by pleading or evidence, and if there is a want of it, and the fact is manifest that the suit has actually been brought for the benefit of some third person, and that no obligation to the general public exists which requires the United States to bring it, then the suit must fail."

There is still another ground upon which the defendants raised the objection that the action was defeated by the filing of the second amended complaint. It is the objection suggested (R., p. 67), that another action was pending in the State Superior Court for Siskiyou County, in which the Indians appeared directly, and in which the right of

their possession was the issue, and in which they disclaimed any relation of wardship to the United States and repudiated the authority of the United States in that connection. Prior to the filing of the second amended complaint there was no real question as to right of possession; it was not an issue. There is nothing in the allegations or in the proof to indicate that the admitted possession of the Indians had been disturbed or threatened with disturbance. It is apparent upon the face of the record (although the trial court rejected the offer of proof) that another action was pending involving this precise issue prior to the filing of the second amended complaint, when the question of possession for the first time became relevant. We say the question was relevant simply because the trial court entertained the proposed issue in the second amended bill, and not because we consider the question material to any substantial issue. At all events the action must have abated when, by the filing of the second amended complaint, it was disclosed that plaintiff was without capacity to maintain the action in that form; that the court was without jurisdiction to entertain the action in that form (*United States* vs. *Waller*, supra); and that another action was pending in the state court wherein the Indians themselves were direct parties.

VII.

The cause is barred by the statute of limitations.

The Court of Appeals held, upon the assumed authority of *Northern Pacific Railway Company* vs.

United States, 227 U. S. 355, and *United States* vs. *Whited & Wheless*, 246 U. S. 552, that this cause is not barred by the statute of limitations. Neither case is in point. The latter was not an action to cancel a patent. Had it been such an action this court declared (p. 560): "Plainly it would be barred." The former is not in point because the lands were part of the Yakima Indian reservation under a treaty with the Yakimas of June 9, 1866 (12 Stat. 951). The lands were *reserved* in the fullest sense of the term, and the court expressly held that "there is no question made of the title of the railroad and railway companies or of their respective vendees other than as the lands fall within or without the reservation." (p. 356.) The ground upon which the statute was held not to apply is that the land was not "*subject to acquisition under the laws enacted for the disposition of the public domain.*" (p. 367.) The lands here in question were *not* within any Indian reservation; they *were* subject to disposition under the public land laws. If the lands did not pass to the railroad company under the land grants, they could have been, and still may be, entered by the Indians under the provisions of the homestead law. It will not be contended by the government, we apprehend, that the United States is bound to recognize any right of continued occupancy by Ellen Ruff or Maggie Wall. In fact the Circuit Court of Appeals does not disturb the conclusion of the District Court that the Indian right of occupancy is "subject only to interference by the United States." The guardian may

see fit to remove the Indians to a reservation where they can be given a higher degree of care. On the other hand, the Indians may object to being removed upon the ground that they are citizens with full right of appropriation of these lands. In either event there is no right or claim involved other than the claims of the parties to the action and the individual Indians. The circumstances of this case are controlled by the rule announced in *United States* vs. *Chandler-Dunbar Co.*, 209 U. S. 447. We quote pages 449-450:

> "There is force in the contention of the United States that the land was reserved and that it had not been surveyed, but we find it unnecessary to state or pass upon the arguments, because we are of opinion that now the patent must be assumed to bo good. The statute just referred to provides that 'suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act.,' that is to say, from March 31, 1891. This land, whether reserved or not, was public land of the United States and in kind open to sale and conveyance through the Land Department. *United States* vs. *Winona & St. Peter R. R. Co.*, 165 U. S. 463, 476. The patent had been issued in 1883 by the President in due form and in the regular way. Whether or not he had authority to make it, the United States had power to make it or to validate it when made, since the interest of the United States was the only one concerned. We can see no reason for doubting that the statute, which is the voice of the United States, had that effect. It is said that the instrument was void and hence was no patent. But the statute presupposes an instrument that

might be declared void. When it refers to 'any patent heretofore issued,' it describes the purport and source of the document, not its legal effect. If the act were confined to valid patents it would be almost or quite without use. *Leffingwell* vs. *Warren*, 2 Black. 599."

VIII.

The Government is estopped.

Upon the question of estoppel, there is a fourfold reason for imposing this salutary doctrine upon the plaintiff in the present case:

(1) The plaintiff issued unto defendants' predecessor, pursuant to Congressional grant, its patent purporting to convey the title in fee simple, unhampered by covenant or condition.

(2) The plaintiff some time before the action was commenced accepted from the defendant railroad company leases under which possession of these Indians was held up to the time of the action. Without questioning the right of the Indians to repudiate the leases under which this possession was maintained, it cannot be said, without doing great violence to settled principles of law, that the United States is not estopped. That a tenant cannot be heard to deny the title of his landlord is the recognized rule of the federal courts as well of the state courts. As early as 1831 the United States Supreme Court declared this rule in the case of *Peyton* vs. *Smith*, 5 Pet. 483, and said (p. 491):

> "The same principles which would prevent a tenant from contesting his landlord's title in a court of law, would apply with greater force in a court of equity, to which he would apply, for

the quieting of a tortious possession, and a conveyance of the legal title."

(3) The appellants, Fred W. Cramer and Ira B. Cramer, are now the beneficially interested parties; they purchased while the leases from the Central Pacific Railway Company to the United States of America were in effect, and their purchases were made expressly subject to the government's leasehold interest. Neither they nor Central Pacific Railway Company had any intimation of any right asserted by the Indians or by the United States in its own behalf or in behalf of the Indians. The Cramers paid value for the lands and are, in every sense, innocent purchasers. The land is not in terms excepted from the grant, and there is no act of Congress conferring any right upon the Indians. The Circuit Court of Appeals claims no support in the acts of Congress, and, if we concede a favorable policy in the Department of Interior the government is estopped from applying that policy here for the reasons given.

(4) The Circuit Court of Appeals concludes its opinion with the statement that for these lands the Railroad Company "was authorized to take lieu lands". In this, however, the Court of Appeals has overlooked the fact that no lieu lands are shown to exist, even though we assume the abstract right to exist. The debates in Congress preceding the passage of the Act of June 25, 1866, indicate that even then there was not sufficient unsettled domain to satisfy the grant. In the Congressional Globe,

1865-66, Part IV, page 3299, June 20, 1866, General Bidwell, speaking in the House upon the question of proposed lateral limits, declared that "the line of this road has been settled for sixteen years, and every available acre of good land has been occupied. You wish to restrict us within limits where there are no public lands. I was in that country before it belonged to the United States and helped to acquire it."

On the day next preceding General Bidwell, in response to a question from Mr. Julian, answered:

> "* * * the limits are fixed at twenty miles, and, as I think, unjustly fixed at twenty miles, taking into consideration that the country along the entire length of the road has been settled for sixteen years. * * *." (Congressional Globe, 1865-66, Part IV, page 3269.)

The respect owed by respondent to the grant of July 25, 1866, is the respect owed by any grantor to the title of his grantee. This is well illustrated in a recent case involving this same grant. We refer to *Payne, Secretary of the Interior* vs. *Central Pacific Railway Company*, 255 U. S. 228, quoting from *Burke* vs. *Southern Pacific Railroad Company*, supra:

> "The act did not follow the building of the road but preceded it. Instead of giving a gratuitous reward for something already done, the act made a proposal to the company to the effect that if the latter would locate, construct and put into operation a designated line of railroad, patents would be issued to the company confirming in it the right and title to the public

lands falling within the descriptive terms of the grant. The purpose was to bring about the construction of the road, with the resulting advantages to the Government and the public, and to that end provision was made for compensating the company, if it should do the work, by patenting to it the lands indicated. The company was at liberty to accept or reject the proposal. It accepted in the mode contemplated by the act, and thereby the parties were brought into such contractual relations that the terms of the proposal became obligatory on both. *Menotti* vs. *Dillon*, 167 U. S. 703, 721. And when, by constructing the road and putting it in operation, the company performed its part of the contract, it became entitled to performance by the Government. In other words, it earned the right to the lands described."

(See also *United States* vs. *Northern Pacific Railway Company*, 256 U. S. 51.)

It is true the government sometimes claims immunity from certain species of estoppel, but the rule is well established that this immunity is limited to questions of delay and laches; it does not extend to general considerations of equity. A single pertinent case is, perhaps, sufficient to illustrate the point. We quote from *State of Iowa* vs. *Carr*, 191 Fed. 257, in the Circuit Court of Appeals for the eighth circuit. The excerpt is from page 266:

"But the great weight of authority, the stronger reasons and the settled rule upon this subject in the Courts of the United States, is that, while mere delay does not, either by limitation or laches, of itself constitute a bar to suits and claims of a state or of the United States, yet, when a sovereignty submits itself

to the jurisdiction of a court of equity and prays its aid, its claims and rights are judicable by every other principle and rule of equity applicable to the claims and rights of private parties under similar circumstances.

"The equitable claims of a state or of the United States appeal to the conscience of a chancellor with the same, but with no greater or less force than would those of an individual under like circumstances. *United States* vs. *Stinson*, 197 U. S. 200, 204, 205, 25 Sup. Ct. 426, 49 L. Ed. 724; *United States* vs. *Detroit Timber & Lumber Co.*, 67 C. C. A. 1, 10, 131 Fed. 668, 677; *United States* vs. *Chicago, M. & St. P. Ry. Co.* (C. C.), 172 Fed. 271, 276; *United States* vs. *Chandler-Dunbar Water Power Co.*, 152 Fed. 25, 26, 27, 37, 38, 40, 41, 81 C. C. A. 221, 222, 223, 233, 234, 236, 237; *United States* vs. *Stinson*, 125 Fed. 907, 910, 60 C. C. A. 615, 616; *Herman on Estoppel*, Sections 676, 677; *State of Michigan* vs. *Jackson, L. & S. R. Co.*, 16 C. C. A. 345, 351, 69 Fed. 116, 122; *State* vs. *Flint & P. M. R. Co.*, 89 Mich. 481, 51 N. W. 103, 106; *United States* vs. *California & Oregon Land Co.*, 148 U. S. 31, 41, 13 Sup. Ct. 458, 37 L. Ed. 354; *Carr* vs. *United States*, 98 U. S. 433, 438, 25 L. Ed. 209; *United States* vs. *Walker* (C. C.), 139 Fed. 409, 411, 412, 413; *United States* vs. *Willamette Valley & C. M. Wagon Road Co.* (C. C.), 55 Fed. 711, 717; *Attorney General* vs. *Central Railway Co.*, 68 N. J. Eq. 198, 59 Atl. 348."

CONCLUSION.

To review briefly in conclusion, Ellen Ruff and Maggie Wall settled upon these tracts not earlier than 1859, and perhaps as late as 1873, if we may accept their own statements. At all events it was years after the land had become public domain. In 1851 Congress had, with deliberation, promulgated a rule for the positive determination of all Indian possessory claims in California, as between the Indian and the government. This rule concluded any proprietary claim of the ancestors of Ellen Ruff and Maggie Wall.

In 1852 the Senate positively refused to negotiate with the Indians to settle the land claims by treaty. That same year Congress made provision for the removal of all Indians at large in California and their establishment on restricted reservations. Thereafter from time to time further accommodation and increased reservation facilities were provided with supplemental instructions from Congress to accomplish the complete removal of the Indians from the public domain. Finally, in 1864, Congress closed the question by the Act of April 8th, that year, directing even the surplus areas in the Indian reservations to be thrown open to Caucasian entry.

In 1866 there was not a shred of legislative fiber to sustain an Indian claim in California outside of the reservations. Congress had in most positive

terms and by successive legislative enactments declared all previous Indian holdings to be public domain and had repeatedly directed the removal of the Indians. Economic necessity and the right of conquest (with due respect to William Penn) were the reason and the means; but we are not concerned with the policy or the moral aspect of the right. Certain it is that Congress did exactly as we have recited; and when Congress had thus declared, who is there to question?

The land was public domain, and as such was granted by the Act of July 25, 1866. The patent is invulnerable to any attack by the Government on the score of Indian possession.

It is respectfully submitted that the decrees below should be reversed with direction to the district court to dismiss the second amended bill.

Dated October 24, 1922.

FRANK THUNEN,
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